

UNCITRAL Investor-State Claim - Eureko - Partial award

United Nations Commission on International Trade Law UNCITRAL

Award

**Partial Award in the Matter of an UNCITRAL Arbitration
Eureko B.V (Claimant) v Republic of Poland (Defendant)**

Industry: Insurance Carriers

Case Type: International

Award Amount: Not Applicable

Claimant's Attorney: Peter Bannier; Hester Bos; Max van Leyenhorst; Koen Rutten; Daniella Strik; Otto L.O. de Witt Wijnen; Witold Danilowicz; Witold Jurcewicz

respondent's Attorney: Jeffrey M. Hertzfeld; Sarah François-Poncet; Krzytstof Stefanowicz; James Crawford

Award Date: 19 August 2005

Arbitrator: Yves Fortier (President); Stephen Schwebel; Jerzy Rajski

Country: Belgium

Award history:

- Procedural Order No. 1, 15 June 2003

In an Ad Hoc Arbitration

Between:

Eureko B.V. (»Claimant«)

Represented by:

- Mr. Peter Bannier
- Mr. Hester Bos
- Mr. Max van Leyenhorst
- Mr. Koen Rutten

• Mrs. Daniella Strik

• Mr. Otto L.O. de Witt Wijnen of the law firm **NautaDutilh**, as Counsel

• Mr. Witold Danilowicz

• Dr. Witold Jurcewicz of the law firm **White & Case**, as Co-Counsel

And:

Republic of Poland (»Respondent«)

Represented by:

• Mr. Jeffrey M. Hertzfeld

• Ms. Sarah François-Poncet

• Mr. Krzytstof Stefanowicz of the law firm **Salans**, as Counsel

• Professor James Crawford, SC, FBA of Lauterpacht Research Centre for International Law, University of Cambridge, as Special Counsel

THE TRIBUNAL, composed as above, after deliberation, makes the following Partial Award:

I. PROCEDURAL HISTORY

A. Commencement of Arbitration

1. The present dispute is submitted to arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments of 7 September 1992 (the »**Dutch-Polish BIT**«, the »**BIT**« or the »**Treaty**«).

2. The arbitration clause in the Treaty reads in part as follows:

Article 12

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall as far as possible be settled

through diplomatic channels.

2. If the dispute cannot thus be settled within six months, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

3. The arbitral tribunal shall be constituted as follows: each Party shall appoint one arbitrator and these two arbitrators shall agree upon a national of a third State as chairman. The arbitrators shall be appointed within three months, the chairman within five months from the date on which either Party has informed the other party that it intends to submit the dispute to an arbitral tribunal.

[...]

6. The tribunal shall decide on the basis of respect for the law, including particularly this Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the tribunal to decide the dispute *ex aequo et bono* if the Parties so agree.

7. Unless the Parties decide otherwise, the tribunal shall determine its own procedure.

8. The tribunal shall reach its decision by a majority of votes. Such decisions shall be final and binding on the Parties.

[...]

3. On 11 February 2003, Eureko B.V. (»**Eureko**« or »**Claimant**«), a company incorporated in the Kingdom of the Netherlands, submitted its Introductory Note to the Arbitration against the Republic of Poland (»**RoP**« or »**Respondent**«), alleging that various acts and omissions by Respondent constituted breaches of the Treaty.

4. On 14 April 2003, Respondent filed its Response

to the Introductory Note to the Arbitration contesting the arbitral tribunal's jurisdiction, alleging that Claimant's claims were not properly particularized and, generally, denying that it had breached the Treaty.

5. In accordance with Article 12 of the Treaty, Claimant designated Judge Stephen M. Schwebel as arbitrator and Respondent designated Professor Jerzy Rajska. The party-appointed arbitrators appointed Mr. L. Yves Fortier, CC, QC as President of the Tribunal. Ms. Catherine Dagenais was later designated by the Tribunal as Secretary, with the agreement of both Parties.

6. A first session of the Tribunal was held in London on 8 May 2003 in the presence of representatives of the parties.

7. At the preliminary hearing, the Tribunal submitted to the parties draft Terms of Appointment which were subsequently agreed by the parties. For purposes of the present Award, only the following provision of the Terms of Appointment needs to be reproduced:

[...]

7. Place of Arbitration

The Parties have agreed that the juridical seat of the arbitration is Brussels.

8. As agreed by the parties in the course of the first session of the Tribunal and as subsequently directed by the Tribunal, Procedural Order No. 1 was issued on 15 June 2003 setting out a detailed timetable for the conduct of the arbitration.

9. As envisaged in Procedural Order No. 1, during the course of the written phase of the arbitration there were requests by both parties for production of documents. All of these requests were dealt with by the Tribunal in a timely manner by way of written Orders.

10. The Tribunal considers it unnecessary to de-

scribe the numerous procedural issues that it was called upon to resolve, or to recount the parties' many submissions, requests and applications relating to these issues. It suffices to note that throughout the pre-hearing phase of the arbitration, the Tribunal was called upon to consider and determine, occasionally further to telephone hearings with the parties, numerous issues ranging from the disclosure of documents to the deadline for the production of written materials.

11. In accordance with the provisions of Procedural Order No. 1, as amended, Claimant submitted its Statement of Claim together with the documents and statements of witnesses and experts on which it intended to rely by 15 June 2003.

12. Respondent submitted its Statement of Defense together with the documents and statements of witnesses and experts on which it intended to rely by 15 October 2003.

13. On 15 October 2003, Respondent filed an Application to the Tribunal to have its jurisdictional defense heard as a preliminary matter. Following an exchange of letters between the parties, the Tribunal ruled on 11 November 2003 that Respondent had elected not to proceed with its Application and that its jurisdictional defense would be joined to the merits.

14. Claimant submitted its Statement of Reply together with additional documents on 5 January 2004.

15. On 30 April 2004, Respondent submitted its Rejoinder together with additional documents.

16. After consultation with the parties, the Tribunal ordered in Procedural Order No. 1 that the proceedings would be bifurcated. Liability, if any, would be addressed in a first phase. If liability were to be found, a second phase of the arbitration would address remedies.

17. The substantive hearing on the merits of whether or not the Respondent is liable for breach of

Treaty was held on 7, 8, 9, 10, 13 and 14 September 2004. As directed in Procedural Order No. 1, the hearing was held in London, although Brussels remains the situs of the arbitration.

18. In the light of the decision of the Tribunal finding Respondent to have breached the Treaty, the present Award is a partial Award. Consequently, unless the Parties settle their dispute amicably, the Tribunal, after consultation with the parties, will need to fix dates for a hearing on quantum of damages or other appropriate remedies, if any.

19. In addition to their extensive written pleadings, the parties also filed witness statements (including supplemental statements) and expert reports, with accompanying materials, from the witnesses of fact and the expert witnesses who gave evidence on their behalf.

20. **CLAIMANT** filed the following witness statements:

- **Mr. Ernst Jansen**, Vice Chairman of the Executive Board of Eureko and Vice Chairman of the Supervisory Board of PZU. Mr. Jansen's testimony principally concerned negotiations leading to the execution of the SPA, the »troubles« with the management of PZU after January 2000, the negotiations leading to the execution of the First Addendum, the failed preparation of the IPO, the negotiation leading to the execution of the Second Addendum and the deterioration of the relationship between the parties with the arrival of Minister Kazcmarek.

- **Ms. Joyce Deriga**, Secretary to the Management Board of Eureko and a member of the Supervisory Board of PZU Life. Her testimony principally concerned the tender and due diligence process by Eureko with regard to PZU as well as her involvement in meetings of PZU which she attended as a proxy holder.

- **Mr. João Talone**, CEO of Eureko's Board from 1 September 1999 until 31 December 2001. He left

Eureko in December 2001. Mr. Talone's testimony principally concerned the negotiations with the State Treasury of Poland resulting in the SPA, the relationship between Eureko and the State Treasury after execution of the SPA, the events leading to the execution of the First Addendum and the Second Addendum.

- **Mr. Jerzy Zdrzalka**, Chairman of the Management Board of PZU S.A. from 30 June 2000 to 6 January 2001. Mr. Zdrzalka's testimony principally concerned the functioning of the Management Board during his tenure and the attempts to dismiss Mr. Wieczerzak from the Board of PZU Life, management problems within PZU, and various resolutions discussed during shareholders' meetings.

- **Mr. Antonio Fernando Mello Martins da Costa**, PZU Management Board member from November 1999 until October 2002 (with some interruptions). Mr. da Costa's testimony principally concerned the negotiations and execution of the SPA and his role as a member of the management Board of PZU. His testimony also concerned the changing relationship between PZU, Eureko, and different Ministers of State Treasury. He also testified about the harassment which he alleges he was subject to in Poland.

21. **CLAIMANT** filed the following expert report:

- **Dr. Andrzej W. Wi[sacute] niewski**: Mr. Wi[sacute] niewski's testimony principally concerned the following legal questions:

1. What, under Polish law, is the relationship between Art. 8(2) of the Treaty and Art. 11 (3) (2) of the SPA?

2. Can Eureko bring a court action before Polish state courts against the Republic of Poland for (i) any breaches of the Treaty and (ii) damages resulting therefrom?

3. Can MST rely upon the provisions of Addendum I as precluding Eureko from raising any claims resulting from earlier non-performance by MST?

22. **RESPONDENT** filed the following witness statement:

- **Mr. Zdzislaw Montkiewicz**, President of the Management Board of PZU from February 2002 until 28 May 2003. Mr. Montkiewicz's testimony principally concerned his role and responsibilities as President of the Management Board of PZU during his tenure, his interpretation of »governance« of PZU and the reasons why the IPO was not carried out.

23. **RESPONDENT** filed the following expert reports:

- **Professor Barbara Kudrycka**, Prof. Kudrycka's testimony principally concerned the following legal questions:

1. What is the legal nature and effect of a resolution issued by the Council of Ministers?

2. What is the extent to which a resolution from the Council of Ministers binds a Ministry to take all steps necessary to implement the resolution, including the issuance of a permit?

3. Can the Ministry of State Treasury require the Ministry of Finance or the Ministry of Internal Affairs and Administration to take an action (if such action is moreover in furtherance of a resolution of the Council of Ministers)?

4. Do administrative bodies authorized by statute to issue permits act independently from other authorities of the Republic of Poland?

5. Are such administrative bodies solely responsible for granting or refusing such permits and their contents?

6. Can any other branch or other administrative agency of the Government of the Republic of Poland give assurances to a third party about whether such permit will be granted or refused? What is the effect or weight of such an assurance?

• **Dr. Matthew Szpunar:** Dr. Szpunar's testimony principally concerned the following legal questions:

1. Is the effect of Article § 3 point 2 of the SPA 1999 to confer exclusive jurisdiction to hear any claims »arising from« the SPA 1999, the First Addendum and the Second Addendum (the »Agreements«) upon »a Polish public court competent with respect to the Seller«, to the exclusion of any other court or Tribunal? For this purpose what would constitute a »Polish public court competent with respect to the Seller?«

2. Could Eureko and the State Treasury have agreed to submit claims arising from the Agreements to the national courts of another state, or to international arbitration outside Poland?

3. Would a Polish court consider the SPA 1999, the First Addendum and the Second Addendum to be governed by Polish law?

4. What is the scope of the jurisdiction clause in Article § 3 point 2 of the SPA 1999 according to Polish law?

5. From a Polish law perspective should claims against the Republic of Poland »arising from« the contracts between Eureko and the State Treasury be brought only before the Polish court pursuant to the exclusive jurisdiction clause?

24. With its written pleadings, as well as during the hearing on the merits, Claimant submitted more than 152 exhibits, some of them accompanied by a multitude of Annexes. (Such as Exhibit 190 which contains 64 annexes).

25. With its written pleadings as well as during the hearing on the merits, Respondent submitted more than 248 exhibits.

26. In addition to being examined and cross-examined by counsel, throughout the hearing the parties' fact and expert witnesses responded to questions from members of the Tribunal. The Tribunal also put questions to the parties' legal rep-

resentatives.

27. As directed by the Tribunal, Claimant and Respondent filed their Post-Hearing Briefs simultaneously on 20 October 2004.

28. On 22 November 2004, the Tribunal required additional submissions from the Parties on two specific issues that had arisen in the course of the Tribunal's initial deliberations. These issues will be dealt with later in the present Award.

29. As directed by the Tribunal on 22 November 2004, the parties submitted, simultaneously, additional briefs on these two issues on 15 January 2005.

30. As directed by the Tribunal, the parties submitted, simultaneously, Reply Briefs on these two issues on 7 February 2005.

31. The Tribunal considers it appropriate to mention that, as expressly authorized by Article 12, Para. 6 of the Treaty, before the conclusion of the hearing in September 2004, the Tribunal invited the parties to attempt to settle their dispute amicably and indicated the readiness of the President of the Tribunal to lend such assistance in that regard as might be requested.

32. In their written submissions to the Tribunal, the possibility of an amicable settlement was alluded to and, indeed, after the Tribunal's deliberations had commenced, the parties requested the Tribunal to suspend its deliberations, in order to permit them to engage in discussions.

33. On 7 February 2005, Claimant's Counsel informed the Tribunal that a settlement between the parties could not be reached. The Tribunal considered the proceedings closed as of that date and resumed its deliberations.

B. Factual Background

34. The dispute between the Parties raises a number of important legal issues. As is generally the case in any domestic or international legal proceeding, the

documentary evidence submitted to the Tribunal by both parties, particularly documents whose existence or authenticity are not disputed, informs the Tribunal's analysis of these legal issues. The present case is no exception and the Tribunal will now proceed to review those documents which it considers material and relevant to its decision.

35. In this part of its Award, the Tribunal will also refer to some of the oral evidence which complements the documentary evidence.

36. In 1999, Powszechny Zakład Ubezpieczeń S.A. (»PZU«) was a large, wholly state-owned, Polish insurance company. PZU held 100% of the shares in Powszechny Zakład Ubezpieczeń ma Życie S.A. (»PZU Life«), which itself owned various smaller subsidiaries. PZU and its subsidiaries, including PZU Life, are referred to as the »PZU Group«.

37. The PZU Group was at that time the leading insurance group in Poland as well as a leading financial institution in Central and Eastern Europe.

38. On 18 March 1999, in furtherance of its privatization policy, the Republic of Poland, acting through its Council of Ministers, at a meeting chaired by the then Prime Minister, following a presentation made by the then State Treasury Minister, took the following decision to begin the privatization of PZU. The Resolution stated:

Application for the Council of Ministers' consent to privatization of Powszechny Zakład Ubezpieczeń S.A. and on the acceptance of the privatization strategy together with a draft protocol notes - presented by Emil Wasacz, State Treasury Minister, who also filed an auto-amendment.

Following a discussion, the Council of Ministers granted, pursuant to Art. 1a Section 2 of the Act of August 30, 1996, on Commercialization and Privatization of State-Owned Enterprises, a consent to the privatization of Powszechny Zakład Ubezpieczeń S.A. and it accepted the privatization strategy including the sale of a block of 30% of the shares of

the Company pursuant to the procedure of negotiations undertaken based on a public invitation in accordance with Art. 33 Section 1 Clause 3 of the said Act, to a sector investor or to a group of investors that would include a sector investor, and the sale of the block of shares remaining in the hands of the State Treasury pursuant to the procedure provided for in Art. 33 Section 1 Clause 1 of the said Act, i.e., in an offer announced publicly, no later than in 2001. (*Emphasis added*).

39. In accordance with this Resolution, the State Treasury of the Republic of Poland, the registered owner of the PZU shares, proceeded to an international tender and published a public invitation on 10 May 1999 in the »Rzeczpospolita« and »Financial Times« newspapers to sell 30% of the share capital of PZU.

40. After extensive negotiations, the State Treasury of the Republic of Poland selected Eureko B.V. and Big Bank Gdanski S.A. (»BBG«) as the buyers.

41. On 5 November 1999, the State Treasury of the Republic of Poland, represented by the Minister of the State Treasury, (the »**Seller**«), entered into a Share Purchase Agreement (the »**SPA**«) with Eureko B.V. and Big Bank Gdanski S.A. (the »**Buyers**«). Under the terms of the SPA, Eureko purchased 20% of the PZU shares and BBG 10%. ^[FN1] Their investment, when made, totaled nearly 700,000,000 Euros.

42. Since the SPA, together with the two Addenda which followed, lie at the heart of the present proceedings, the Tribunal considers it essential that the following provisions be recited *in extenso*:

Article 1

Par. 1 General Provisions

1. Under the terms and conditions described below, on the date of the execution of this Agreement, the Seller undertakes to sell, and the Buyers undertake to purchase, on the Agreement Performance Date (as defined below), 2,590,569 (two million five

hundred and ninety thousand five hundred and sixty nine) Series A shares of the Company with assigned numbers from 0000001 to 2590569, with a nominal value of PLN 10 (ten Polish Zloties) each, constituting a total of 30% (thirty percent) of the share capital of the Company (hereinafter referred to as the »Shares«) of which EUREKO purchases 1,727,046 (one million seven hundred and twenty seven thousand forty six) Series A shares of the Company, and BBG purchases 863,523 (eight hundred and sixty three thousand five hundred twenty three) Series A shares of the Company with assigned numbers from 1727047 to 2590569, constituting 10% of the share capital of the Company.

2. The Seller sells, and the Buyers purchase the Shares along with all rights arising from them.

[...]

Par. 5 - Consent of the Minister of Finance

The Seller is aware of and fully supports Eureka's efforts aimed at obtaining the consent of the Minister of Finance of the Polish Republic to purchase shares in the Company ensuring that Eureka exceeds 25% of the votes at the General meeting of Shareholders of the Company, issued under Art. 11 d section 1 item 2 of the Law on Insurance Activity dated July 28, 1990 (unified text: Dz.U. dated February 2, 1996 Nr 11, poz. 62).

Article 3

Par. 1 - Public Offer of Shares

1. The Buyers are aware of and fully support the intention of the Seller and the Company to publicly trade, through an Initial Public Offering (hereinafter referred to as the »IPO«), a part or all of the shares of the Company as soon as it is practicable, however, no later than by the end of the year 2001, unless it is impossible to carry out the IPO in the above specified period due to market conditions unsatisfactory to the Seller. The Buyers and the Seller undertake to take all actions which may be required to be taken in connection with the

preparation for, and the realization of, such IPO. In addition, the Buyers and the Seller undertake to take all actions with proper care (with consideration given to the professional nature of business, in the event of the Buyers), in particular by exercising their voting rights arising from the shares or otherwise by their influence in the Company or in its governing bodies provided for in the Company's Articles of Association, to ensure that the Company takes all actions necessary in connection with the preparation for, and the realization of, the IPO within said period. Without limitation to the foregoing obligation of the Parties, such actions may include, *inter alia*, amendments to the Company's Articles of Association, as required by the Securities and Exchange Commission, split of all shares of the Company into a larger number of shares having a smaller nominal value, appointment of independent members of the Company's Supervisory Board, or implementation of other reasonable recommendations of the Securities and Exchange Commission and the bank responsible for placing Company shares through the IPO.

2. The Seller intends to sell all the remaining of the Company (which shares were not otherwise allocated to the employees of the Company or to a privatization reserve, or the sale of which is not otherwise limited by applicable law) in the IPO, and successive public offerings, and to list the shares on the Warsaw Stock Exchange or in the form of depository receipts on other stock exchanges in the world. The Buyers and the Seller undertake to apply proper care in order to cause that the remaining Company shares are admitted to public trading in the event of a successful IPO.

3. The Seller does not intend to sell a strategic block of shares of the Company through public trading to a strategic investor other than the Buyers, which investor is the Buyer's direct or indirect competitor in the market, with the exception of the sale to insurance companies, banks, and financial institutions which purchase the Company shares as a portfolio investment. Every instance of the sale of a

block of the Company shares exceeding 5% of the share capital of the Company in public trading to an investor acting directly, or to an investor which the Seller knows acts indirectly or in cooperation with another investor or investors aiming at purchasing the Company shares, shall require the Buyers' prior consent which may not be unreasonably withheld. If the Seller violates the foregoing limitation concerning the sale of said 5% of shares in public trading, the Buyers will no longer be bound by the limitation concerning the sale of the Shares, as referred to in Art. 4 § 6 item 2 point 1(i). If the Buyers decide to sell all the Company shares held by them and their subsidiaries to an independent third party, then, after having effected such a sale, the Buyers will no longer be bound by the remaining limitations provided herein.

[...]

Par. 13 - PZU Development Plan

1. The Buyers undertake to fully support the leading position of the Company in Poland and its development in accordance with the PZU Development Plan attached hereto as Appendix 5, through, among others, (i) the strengthening of the PZU Group's position in the market and (ii) the availability of IT systems, know-how and organizational methods to the PZU group.

2. On the conditions commonly applicable in trade but not worse than those applicable to the capital group of each of the Buyers, the Buyers shall make available to the PZU group the technical, technological and organizational support through the delivery of, among others, licenses, IT systems, know-how and other rights and solutions necessary for the realization of the PZU Plan described in Appendix 5 hereto.

Article 5 - Future Operations of the Company

[...]

Par. 2 - Election of Company Authorities

1. Prior to the Agreement Performance Date, the Seller agrees to resolve on a new composition of the Supervisory Board in accordance with Appendix 8 to the Agreement. Immediately after the Minister of Finance of the Polish Republic approves of the amendments to the Articles of Association in the wording set forth in Appendix 7 hereto, the Seller and the Buyers undertake to ensure (by exercising their voting rights arising from the shares or otherwise by the Parties' influence on the Company) that:

a) the President of the Management Board and the members of the Management Board of the Company will be appointed in compliance with Appendix 8 hereto

b) the recalling and appointment of the Chairman of the Supervisory Board and the President of the Management Board of the Company will require the Seller's and the Buyers' consents

c) the Seller and the Buyers will appoint an equal number of members of the Supervisory Board, i.e. the Seller will appoint four members and the Buyers will jointly appoint four members, while the Supervisory Board will be composed of nine persons in total; and

d) all new members of the Management Board will be appointed by the Supervisory Board upon consultations with the Buyers and the Seller.

2. Moreover, the Parties undertake to ensure (by exercising their voting rights arising from the shares or otherwise by the parties' influence on the Company) that after the first listing of the Company shares on the Warsaw Stock Exchange, the composition of the Supervisory Board is changed in such a manner that the Seller will appoint two members, the Buyers will jointly appoint four members, while the remaining three members of the Supervisory Board will be elected by the General Meeting pursuant to the provisions of the Commercial Code, with the reservation that one member of the Supervisory Board should be an employee of the Com-

pany, and two members should meet the criteria of the so-called »independent members of the supervisory board« in accordance with the international criteria applicable in this respect.

3. The rights of the Parties specified in § 2 items 1 and 2 above expire for each of the Parties when a given Party disposes of all the Company shares it holds.

[...]

Article II - General Provisions

[...]

Par. 3 - Conflict Resolution

1. The Parties represent that they shall strive to resolve all disputes arising from the Agreement through mutual negotiations conducted in good faith.

2. Conflicts between the Parties arising from the Agreement which cannot be resolved by the Parties through negotiations within 30 days, shall be submitted to a Polish public court competent with respect to the Seller.

3. Enforcement proceedings against the Seller shall be conducted only in Poland in accordance with the provisions of Polish law.

[...]

Par. 6 - Governing Law

The Agreement has been made in accordance with Polish law and shall be interpreted in accordance with Polish law.

[...]

Par. 9 - Scope of the Agreement

The agreement (along with the Appendices) constitutes the entire agreement between the Parties and supersedes all prior written and oral agreements

between the Parties, within the scope hereof.

Par. 10 - Language - Copies of the Agreement

The Agreement was prepared in the Polish language which version is the only legally valid and binding version. The Agreement is prepared in three identical counterparts, one for each Party.

Par. 11 - Validity of the Agreement

1. If any of the provisions of the Agreement are deemed illegal, unenforceable, or invalid by the Parties, a court or any other competent authority, such provisions shall be void only within the scope of such inconsistency with the law, unenforceability, or invalidity, and the remaining provisions of the Agreement shall remain in effect.

2. With respect to provisions considered invalid or unenforceable, the Parties shall negotiate in good faith to preserve their original intent.

Par. 12 - Modifications of the Agreement

This Agreement and Appendices hereto may be modified only in writing under pain of invalidity, upon the consent of both Parties. (*Emphasis added*)

43. Within a few months after execution of the SPA, Claimant alleges that »it found itself in a political quagmire«, that »PZU was at the epicentre of Polish party politics and that »it appeared that the privatization of PZU was becoming more and more a political issue«.

44. Claimant also submits that, during this period, because of certain specific actions by the Minister of the State Treasury, the corporate governance of PZU and its subsidiaries envisaged in the SPA was left in a state of total disarray.

45. The Tribunal notes that, during this period, as a result of the serious deterioration of the relationship between the Parties, both Claimant and Respondent instituted proceedings against one another before Polish courts.

46. The Tribunal notes in particular that, in November 2000, the State Treasury Minister filed a statement of claim petitioning the court to declare the SPA void for reasons which he subsequently acknowledged were politically motivated.

47. From August 2000 through January 2001, in an attempt to gain greater influence over the management of PZU than provided for in the SPA, the State Treasury Minister dismissed representatives of the **Eureko** Consortium from **Eureko's** Supervisory Board.

48. During that period, the State Treasury Minister took actions additional to those referred to in paragraphs 46 and 47 of this Award which also were described in a report of **Poland's** Supreme Audit Chamber as »in breach« of the Agreements concluded by **Poland** with the members of the Consortium, **Eureko** and BIG Bank. ^[FN2]

49. The record also discloses that, during that period, **Eureko** sent numerous letters to the Minister of the State Treasury, the Polish Prime Minister and the European Commission protesting against the way it was being treated and alleging breaches by the Respondent of the Treaty.

50. In these letters, Eureko protested not only actions such as that of the State Treasury Minister petitioning a Polish court to declare the SPA void, but what it saw as endless evasion of Poland's obligation under the SPA to hold an IPO of further tranches of PZU stock.

51. Principally as a result of the involvement of a new Minister of the State Treasury, Mrs. Aldona Kamela-Sowinska, the parties eventually engaged in serious discussions with a view to putting an end to the festering adversarial impasse.

52. These discussions led to the execution by the parties on 3 April 2001 of an Addendum (» **First Addendum**«).

53. A number of provisions of the First Addendum are relevant and material to the determination of the

present dispute by the Tribunal. Accordingly, these provisions are reproduced *in extenso*:

WHEREAS

(A) On November 5, 1999, the Seller, BBG and Eureko concluded an agreement on sale of shares of Powszechny Zaklad Ubezpieczen S.A., with its seat in Warsaw (hereinafter referred to as the »Agreement«

(B) Eureko holds 1,727,046 (say: one million seven hundred twenty seven thousand forty six) Series A shares of Powszechny Zaklad Ubezpieczen S.A. (hereinafter referred to as »PZU« or the »Company«

(C) BBG held 863,523 (say: eight hundred sixty three thousand five hundred twenty three) Series A shares of the Company, which shares today are owned by BBG

(D) By concluding this Addendum the Parties intend:

1. To cause termination (without the right or repeated lodging of claims) of all outstanding controversies, disputes and court actions that have grown among them in relation to the Agreement; and

2. To confirm and agree on steps to be taken in order to implement the intentions and objectives that have been agreed by the Parties in relation to the privatization of PZU and to fully address the underlying roles and positions of the State Treasury and Eureko in the process preceding the Initial Public Offering (the »IPO«); and

3. To immediately undertake corrective steps of the governance of PZU, keeping in mind the acquired rights and mutually assumed obligations of both main shareholders in order to assure the next phase of privatization through IPO to take place before the end of December 2001; and

4. To confirm Eureko as a strategic investor through the commitment of the State Treasury to

sell and of Eureko to buy 21% (say: twenty one per cent) of PZU's shares during the IPO; and

5. To make certain necessary amendments of the Agreement and the Articles of Association of PZU; and

6. To make a joint press release of this Addendum.

Now therefore, the Parties jointly agree as follows:

Article 1

1.1 The fundamental premise and the condition precedent of this Addendum is that the Parties wish to settle and terminate (without the right of repeated lodging of claims) any and all claims and controversies that have arisen among them and in connection with certain individuals in relation to the Agreement.

1.2 The parties shall as soon as practicable cease and terminate all legal actions pending, public statements and adverse media activities in Poland and at international level.

1.3 The Parties undertake that till April 6, 2001 they shall cause actions necessary to effective withdrawal (including the waiver of all claims pursued, without the right of repeated lodging thereof) of all summons and claims with respect to the Agreement, as well as, all other summons and claims that have been filed in connection with the resolutions of the general shareholders' meeting of the Company and lodged by the Seller, the Buyers, or by one or more of the following persons: Boguslaw Kott, Maciej Bednarkiewicz, Jose Martins da Costa, Ernst Jansen, Jerzy Zdrzalka, Fred Hoogerbrug, Rafal Mania and Janusz Zawila - Niedzwiecki. To this end, the Parties undertake to file respective motions and filings till April 6, 2001 and submit to each other the evidence of such actions.

[...]

Article 5

5.1 The Parties and their duly elected representatives in the respective management boards and supervisory boards of PZU and its subsidiaries, shall exercise due care and diligence in order to have the IPO concluded before December 31, 2001.

5.2 Under the IPO organization the Parties agree that 21% (say: twenty one per cent) of PZU's shares shall be offered to Eureko and Eureko is committed to buy those shares without reservation. The price of those shares shall be the highest of the purchasing price under the Agreement on the Sale of Shares or institutional book-building price at the IPO.

5.3 The Parties agree that in the case the IPO is not completed by the end of 2001, the rules and terms established under 5.1 and 5.2 will apply to the IPO at a later stage. The Parties unconditionally undertake to adopt a new schedule for the IPO in such a case.

5.4 The Parties unconditionally undertake that following the IPO the Parties shall make their utmost efforts to agree the schedule for the public offering of any remaining shares held by the State Treasury.

5.4 (sic) The State Treasury undertakes to assist Eureko in their efforts to obtain the needed authorization for the performance of this Addendum and the permit of the Minister of Finance to allow Eureko to become a majority - 51% shareholder of PZU.

Article 6

6.1 The Agreement's provisions on dispute resolution (Art. 11 § 3), Force Majeure (Art. 11 § 4), governing law (Art. 11 § 6), transfer of rights (Art. 11 § 7), announcements and permits (Art. 11 § 8), scope (Art. 11 § 9), language (Art. 11 § 10), validity (Art. 11 § 11), amendments (Art. 11 § 12) and withdrawal and termination (Art. 11 § 3), apply to this Addendum accordingly.

6.2 The Seller hereby agrees that BIG BG Inwestycje S.A. transfers all or part of its shares in the

Company to Eureko prior to the IPO. (*Emphasis added*)

54. After conclusion of the First Addendum, a period of »fruitful cooperation« ensued. Thus, preparation for the IPO was resumed and the State Treasury submitted a first draft of the prospectus to the Polish Securities and Stock Exchange Commission in August 2001. PZU made presentations to analysts and a road show was prepared. The Minister herself visited London to promote the IPO.

55. The events of 11 September 2001 in the United States put in question the feasibility of the IPO before the end of December 2001 as envisaged in the First Addendum.

56. On 25 September 2001, at a session of the Council of Ministers chaired by the then Prime Minister, following a presentation by the then State Treasury Minister, the Council took the following decision:

Following a discussion, the Council of Ministers:

1) with respect to the application set forth under sub-point 1, having heard a separate view presented by Jerzy Kropiwnicki, Minister for Regional Development and Construction, granted its consent:

a) pursuant to Art. 33 Section 3 of the Act of August 30, 1996, on Commercialization and Privatization of State-Owned Enterprises, to the sale of up to 21% of the shares in Powszechny Zakład Ubezpieczen S.A to Eureko B.V., i.e., in accordance with a procedure other than the one provided for in Art. 33 Section 1 of the said Act

b) to change the schedule of privatization with respect to PZU S.A. (*Emphasis added*)

57. What was now envisaged by this Resolution was a direct sale by the State Treasury to Eureko of an additional 21% of the PZU shares rather than through the conduct of an IPO as agreed in the First Addendum. The Tribunal notes that the end result of either transaction was the same: The Eureko

Consortium, with 51% of the shares, would become the controlling shareholder of PZU.

58. On 3 October 2001, Eureko received the permit of the Minister of Finance envisaged by Article 5.4 (sic) of the First Addendum reproduced above. This consent, allowing Eureko to become a majority (51%) shareholder of PZU, in terms, was only valid until and expired on 31 December 2001.

59. On 4 October 2001, a Second Addendum to the SPA was executed between the State Treasury of the Republic of Poland and Eureko reflecting the decision of the Council of Ministers of 25 September 2001.

60. The key provisions of the Second Addendum are:

WHEREAS,

[...]

(E) The Council of Ministers of the Republic of Poland has passed a resolution to enable the sale of 21% of PZU's shares in a way provided in Art. 33 item 3 of the Law on Commercialization and Privatization of State-Owned Companies dated August 30, 1996 (EDz. U. Nr 118, item 561 as amended)

(F) Eureko has received the consent of the Minister of Finance to acquire more than 50% of the shares of PZU S.A. and the consent of the Office for Protection of Competition and Consumers for such concentration

(G) By concluding this Second Addendum, the Parties intend:

1. the State Treasury intends to sell and Eureko intends to buy 21% (say: twenty one per cent) of PZU's shares if one of the conditions specified in Art. 1 § 5 item 5.1 and the condition specified in Art. 1 § 5 item 5.2 of this Second Addendum shall have been fulfilled.

2. To confirm and agree on steps to be taken in order to implement the intentions and objectives that have been agreed by the Parties in relation to the privatization of PZU and to fully address the underlying roles and positions of the State Treasury and Eureko in the process preceding the Initial Public Offering (the »IPO«); and

3. To establish a corporate governance of PZU, keeping in mind the acquired rights and mutually assumed obligations of the Parties in order to assure the next phase of privatization through IPO to take place before December 31, 2002, or if that is not possible, as soon as possible

4. To make amendments to the Agreement and to the Articles of Association of PZU

5. To exercise due care in order to cause that the IPO is carried soonest possible in accordance with Art. 3 § 1 of the Agreement; and

[...]

Article 1 - General Provisions

1.1 Under the terms and conditions described below, on the date of the execution of this Second Addendum, the Seller undertakes to transfer, and Eureko undertakes to acquire, on the Second Addendum Performance Date (as defined below), 18,133,983 (eighteen million one hundred thirty-three thousand nine hundred eighty-three) Series A registered shares of the Company with assigned number from 38858531 to 56992513, with a nominal value of PLN 1 (one Polish Zloty) each, constituting a total of 21% (twenty one percent) of the share capital of the Company (hereinafter referred to as the »Shares«).

1.2 The Seller sells, and Eureko purchases the Shares along with all rights arising from them.

Article 2. Par. 2 - Place of the Signing and the Day of Performance of the Second Addendum

2.2 The Shares shall be transferred and the Pur-

chase Price shall be paid on the performance date of the Second Addendum (hereinafter referred to as the »Second Addendum Performance Date«), i.e. five days after the date on which the Second Addendum enters into force.

[...]

Par. 5 - Conditions for the Second Addendum's entry into force.

5.1 This Second Addendum will enter into force upon occurrence of one of the following events:

a) The Securities and Exchange Commission has not agreed to the introduction of PZU's shares into public trading by October 5, 2001

b) The Securities and Exchange Commission has agreed to the introduction of PZU's shares into public trading, but the Seller has concluded that the market conditions are not appropriate and the IPO should be postponed after December 31, 2001

c) The IPO of PZU's shares owned by the State Treasury has not been commenced by December 31, 2001, or the IPO has been commenced prior to December 31, 2001 but it has not been completed by December 31, 2001.

5.2 The condition for this Second Addendum entering into force is obtaining the approval of the Minister of Internal Affairs and Administration for the purchase of PZU'S shares, if required by law.

5.3 In the event of occurrence of the condition described in § 5 item 5.1 b) or c) above, the transfer of shares will take place upon occurrence of further condition, that the Securities and Exchange Commission issue a consent for the transfer of PZU's Shares outside the regulated market, in order to carry on the transaction provided in this Second Addendum.

5.4 In the event that the approvals required for the execution of this Second Addendum and for the transfer of the Shares' ownership are not obtained

by the date of December 31, 2001, the Seller and the Buyers shall have the right to withdraw from this Second Addendum.

[...]

Article 7 - Final Provisions

7.1 All provisions of the Agreement and specifically the provisions on dispute resolution (Art. 11 § 3), Force Majeure (Art. 11 § 4), governing law (Art. 11 § 6), transfer of rights (Art. 11 § 7), announcements and permits (Art. 11 § 8), scope (Art. 11 § 9), language (Art. 11 § 10), validity (Art. 11 § 11), amendments (Art. 11 § 12) and withdrawal and termination (Art. 11 § 13), apply to this Second Addendum accordingly, unless this Second Addendum provides otherwise.

7.2 The provisions of the Addendum on causes of termination of all outstanding controversies (Art. 1 items 1.1, 1.2 and 1.3), the permit to exceed 50% (Art. 5 item 5.5), transfer of ownership of the shares of BIG BG Inwestycje S.A. (Art. 6 item 6.2) will remain applicable.

7.3 In all matters regarding the corporate governance of PZU or its subsidiaries, this Second Addendum replaces the Addendum and, to the necessary extent, of (sic) the Agreement. (*Emphasis added*)

61. After execution of the Second Addendum, Eureko took steps to obtain the approval by the Minister of Internal Affairs and Administration («**MIAA**») envisaged in Article 1, paragraph 5.2.

62. It is common ground between the Parties that the Second Addendum never came into force. A critical cause of the failure of the Second Addendum to come into force was the so-called «Kluzek affair».

63. Mr. Kluzek, a State Treasury nominee on the Management Board of PZU in charge of real estate issues, was a participant in the preparation of the prospectus for the IPO. After he and all other sig-

natories signed it, details of the prospectus were refined, as is customary. Mr. Kluzek nevertheless claimed that, solely by reason of such refinements, his signature was »forged«, a charge that the then President of PZU, Mr. Montkiewicz, endorsed, with the result that the State Prosecutor initiated an investigation. The State Prosecutor dismissed the charge, whereupon Mr. Montkiewicz, joined by the Minister of the State Treasury, filed an appeal against the decision of the State Prosecutor. ^[FN3]

64. Although there is a fundamental disagreement between the parties as to the legitimacy of the reasons why the approval of the MIAA was not obtained, and not only because of the still contentious Kluzek affair, it is common ground between the parties that this approval was not obtained by the date of 31 December 2001 and that either party thus had the right to withdraw from the Second Addendum.

65. In fact, on 9 April 2002, the Minister of the State Treasury informed Eureko that it withdrew from the Second Addendum »as from the date of signing, 9 April 2002«.

66. This withdrawal by the Minister was authorized by a resolution of the Council of Ministers adopted on 2 April 2002.

67. This resolution of 2 April 2002 is crucial to the determination by the Tribunal of the present dispute. It is thus reproduced in its entirety:

Application for the Council of Minister's Consent to Change the Privatization Strategy for Powszechny Zakład Ubezpieczeń SA - discussed by Wiesław Kaczmarek, State Treasury Minister.

Additional clarifications made by: Aleksander Proksa, Secretary of the Council of Ministers, and Zdzisław Montkiewicz, President of Powszechny Zakład Ubezpieczeń S.A.

The Council of Ministers, following discussions:

1) resolved that it was essential for the State Treas-

ury to maintain control over Powszechny Zaklad Ubezpieczen S.A and accepted the exercise by the State Treasury Minister of the right to withdraw from the Second Additional Agreement dated October 4, 2001, by and between the State Treasury Minister and Eureko B.V., BIG Bank Gdanski SA and BIG BG Inwestycje SA

2) pursuant to Art. 1a Sec. 2 and pursuant to Art. 33 Sec. 3 of the Act of August 30, 1996, on Commercialization and Privatization of State-Owned Enterprises, consented to a change in the privatization strategy for Powszechny Zaklad Ubezpieczen S.A., owned by the State Treasury, to Eureko B.V., a company organized in accordance with Dutch law, with its registered office in Amsterdam, in a public offering, in accordance with Art. 33 Sec. 1 Clause 1 of said Act, after the shares in Powszechny Zaklad Ubezpieczen S.A have been introduced to public trading.

3) obligated the State Treasurer to advise ambassadors of EU member states of a change in the privatization strategy for Powszechny Zaklad Ubezpieczen S.A. (*Emphasis added*)

68. In terms, this resolution by the Council of Ministers of the Government of Poland, changed the privatization strategy of PZU which had been agreed and announced publicly on 18 March 1999 and, in furtherance of which, the SPA and the First Addendum had been executed.

69. Both before and after the resolution of the Council of Ministers of 2 April 2002, Claimant wrote numerous letters to and held meetings with the State Treasury Minister seeking to establish constructive cooperation between the Polish State and the Eureko Consortium, both with a view towards enhancing the operations of PZU and facilitating performance of Poland's obligations in respect of the holding of an IPO.

70. On 22 May 2002, the then State Treasury Minister, Mr. Wieslaw Kaczmarek, wrote to Mr. Arnold Hoevenaars, CEO of Eureko B.V., setting out the

position of »the Government of the Republic of Poland«.

71. Because of its importance, the Tribunal considers it is necessary to reproduce the letter and the attached Schedule in full. At this stage of its Partial Award, the Tribunal refrains from interpreting the letter but notes that it is clearly premised on the Resolution of the Council of Ministers of 2 April 2002 referred to earlier in Para. 67:

Dear Mr. Hoevenaars,

In response to the letters dated 28 March, 19 and 22 April and 2 May 2002, and with reference to the meetings held at the State Treasury Ministry, I would like to emphasize that the privatization of PZU SA has not been stopped; quite to the contrary, the Government of the Republic of Poland has decided to continue this process:

On 2 April 2002 the Council of Ministers (Cabinet):

1) Decided about the need for the State Treasury to retain control over Powszechny Zaklad Ubezpieczen S.A. and approved the exercise by the Minister of the Treasury of the right to withdraw from the Second Amendment Agreement of 4 October 2001 between the Minister of the Treasury and Eureko B.V., BIG Bank Gdanski S.A. and BIG BG Inwestycje S.A.

2) In accordance with article 1a paragraph 2 and pursuant to article 33 paragraph 3 of the law of 30 August 1996 on the commercialization and privatization of state-owned enterprises, expressed a consent for the change of privatization strategy for Powszechny Zaklad Ubezpieczen Spolka Akcyjna, owned by the State Treasury, to Eureko B.V., a joint stock company established and operating under Dutch law, having its registered office in Amsterdam, under public offer procedure in accordance with article 33 paragraph 1 sub-paragraph 1 of the aforementioned law, after the introduction of shares in Powszechny Zaklad Ubezpieczen Spolka Ak-

cyjna to public trading.

3) Obligated the Minister of the Treasury to notify the ambassadors of European Union Member Countries about the change of privatization strategy for Powszechny Zakład Ubezpieczeń Spółka Akcyjna.

In forwarding this information I would simultaneously like to take a stance on the issues raised in the aforementioned letters.

When taking the office of the State Treasury Minister, at a certain stage of the PZU SA privatization process, which stage was determined by the decisions of my predecessors, I acknowledged all the agreements concluded by the former State Treasury Ministers and the Eureko B.V., BIG Bank Gdanski SA and BIG BG Inwestycje SA Consortium to be binding.

At the same time it should be emphasized that the structure of the Second Addendum signed on 4 October 2001 to the PZU SA Share Purchase Agreement on 5 November 1999 did not grant the State Treasury Minister any decision-making privileges, making the Addendum's entry into force dependent upon the approvals and permits, required by law, from the Finance Minister, the Minister of Internal Affairs and Administration and/or the Securities and Exchange Commission (Polish SEC). Making the decision regarding performance the Second Addendum was not within the scope of my powers. Accordingly, I am forced to reject firmly the accusations concerning both the bad will of the State Treasury Ministry and the action to the detriment of Eureko B.V. In my opinion, the Eureko B.V., BIG Bank Gdanski SA and BIG BG Inwestycje SA Consortium does not have any grounds to demand any indemnification whatsoever of the Republic of Poland's State Treasury.

The entry into force of the Second Addendum was dependent, *inter alia*, upon obtaining, prior to the end of 31 December 2001, a permit from the Minister of Interior Affairs and Administration. Since the consent was not obtained, the Parties obtained the

right to withdraw from the Second Addendum.

The necessity for Eureko B.V. to re-obtain the Finance Minister's consent to purchase PZU SA shares enabling it to exceed 50% of the total number of votes at the Shareholders' Meeting further complicated the situation, which consent, issued on 3 October 2001, expired on 31 December 2001. The lack of the consent in question made it impossible to possibly perform the Second Addendum.

Accordingly, in keeping with the Cabinet's stance, on 9 April 2002 I withdrew from the Second Addendum to PZU SA's Share Purchase Agreement of 5 November 1999, which addendum has been concluded on 4 October 2001 by the State Treasury Minister and Eureko B.V., Big Bank Gdanski SA and BIG BG Inwestycje SA.

At the same time, I would like to clarify the doubt concerning the decision of the previous Government of the Republic of Poland to defer the timing of PZU SA's IPO. Prior to my taking office, the profound crisis of insurance industry companies and the PZU Group's grave internal problems formed a serious risk of the IPO's failure or of obtaining an unfavourable internal price for the Company's shares. Moreover, on 17 September 2001 Eureko B.V. confirmed this willingness to purchase a 21% stake in PZU SA, also by the procedure of negotiations with the State Treasury Minister - in a situation, in which conducting the IPO would be impossible. Accordingly, in response to the request of the then State Treasury Minister, the Cabinet consented on 25 September 2001 to the course of selling up to 21% of PZU SA's shares by direct placement, which shares formed the property of the State Treasury, to Eureko B.V., and to change the privatization schedule and to sell by the Company's remaining shares, belonging to the State Treasury, by public offering by the end of 2002, and not, as the original strategy envisaged, by the end of 2001.

At the same time, the preparation of the documentation required to obtain the consent of the Polish SEC to introduce the company's shares to public

trading still continued.

At my first meeting with the privatization advisor, I requested the continuation of this work.

Unfortunately, the issue prospectus dated 23 November 2001 delivered to me contained grave formal defects. I was notified of the doubts concerning the correctness of how this document was drawn up. I made a notification thereof to the bodies authorized to investigate this matter since the adjudication of this matter was not within the scope of the PZU SA Management Board's powers or the scope of the State Treasury Minister's powers. I would like to emphasize here that both the State Treasury Ministry and PZU SA have submitted a grievance against the decision made by the Prosecutor in the District Prosecution Office in Warsaw to discontinue the investigation into the matter of altering PZU SA's issue prospectus.

Another serious problem was the lack of privatization advisor's stance on the success fee calculated against the value of the 21% stake sold to Eureko B.V., which would have threatened PZU SA with additional expenses. The advisor presented its stance only on 31 December 2001.

In connection with the foregoing doubts, and acting under the pressure of time and without having explained the aforementioned problems, I could not take upon myself the responsibility related to accepting the defective issue prospectus.

At the same time, I would like to emphasize once again that PZU SA's privatization process is being continued. The contracts dated 5 November 1999 and 3 April 2001 concluded by the Eureko B.V., BIG Bank Gdanski SA and BIG BG Inwestycje SA Consortium and the State Treasury Minister are still binding. They will be performed until the Parties make a different decision. Accordingly, in my opinion, there are no grounds to initiate the procedure envisaged in the Agreement between the Republic of Poland and the Kingdom of the Netherlands for the Mutual Support and Protection of Investments

dated 7 September 1992, nor to accuse the State Treasury Ministry of acting to the detriment of Eureko B.V.

During our most recent meetings we have agreed on the cooperation to perform the contracts binding us. Accordingly, the State Treasury Ministry, in keeping its procedures, is preparing the documents required to hire a privatization advisor.

The current privatization advisor has taken the stance that the contract for the provision of advisory services in the PZU SA privatization process, concluded with the State Treasury Ministry is expiring on 31 December 2001. However, in connection with the imprecise wording used in this contract, it has been necessary to have the Legal Department of the State Treasury Ministry interpret its clauses. One should also mention here that in the first months of 2002 the State Treasury Ministry was undergoing reorganization and a new department assumed the supervision over the PZU SA privatization process.

The clauses of the contract with the current privatization advisor - based on an outdated privatization strategy from 1999 - envisaged that the PZU SA privatization process would end in 2001 by selling all the Company's shares belonging to the State Treasury (except for the 5% »restitution reserve«). At present, this contract does not correspond to the assumptions for this Company's privatization; accordingly, one should stop performing it and commence a tender proceeding to select a new privatization advisor whose task will be to draw up a valuation of PZU SA and to sell the Company's shares in a public offering.

The preparation of the new terms of reference for the parties participating in the tender for an advisor in the PZU SA privatization process was dependent, *inter alia*, on the Cabinet's decision on the further course of the Company's privatization. The terms of this engagement should also take into consideration the IPO timetable worked out by the interested Parties. The necessity of selecting a new advisor

and of concluding a contract with it according to new terms and conditions also follows from the fact that the subject matter of the engagement has changed, as have the requirements imposed on the bidders, as well as the value of the engagement, which will have an impact on the price of the services offered.

The dates of the tender proceeding conducted according to the provisions of law are based on the Public Procurement Act and the State Treasury Ministry's internal procedures.

I would like to emphasize once again that it is the will and the goal of the State Treasury Ministry to perform agreements and to sell PZU SA's shares in a public offering. At the same time, one should concur with the opinion expressed by Eureka B.V. that all the irregularities that have occurred in the PZU Group should be clarified by the institutions authorized to do so. The care for the quality of PZU SA's IPO demands both caution and concern for the best preparation of the offering. Accordingly, in my opinion, haste is not advisable, especially since currently no deadlines are binding upon us.

It is necessary to write the optimal work timetable jointly, which aims to sell PZU SA's shares in a public offering. Accordingly, I hereby enclose a draft IPO schedule, which assumes that the cooperation with the current privatization advisor will not be continued, that the State Treasury Ministry will select a new advisor by tender and that the issue prospectus will be based on PZU SA's 2002 financial statement and the PZU Group's 2002 consolidated financial statements. In my opinion, the acceptance of the foregoing assumptions will make it possible to prepare the sale of PZU SA's shares in a public offering diligently and accurately. In my opinion, only a timetable agreed upon by the Parties may be forwarded to the PZU SA Supervisory Board and Management Board for execution.

The State Treasury Ministry has also prepared a tentative version of the »Third Addendum«. It will be presented to the B.V., BIG Bank Gdanski SA

and BIG BG Inwestycje SA Consortium as soon as possible.

In conclusion, I would like to express the hope that the good will shown by the interested Parties and the joint effort made to date, which aim at developing the conditions of future cooperation and ensuring the development of PZU SA as a public company will not be ruined ^[FN4] by making unfounded accusations and that we will be successful in striking an agreement.

Respectfully,

Wieslaw Kaczmarek

Schedule For PZU SA's IPO

Terminate the contract with the current privatization advisor

Prepare the terms of reference for the parties participating in the tender to become the advisor to the State Treasury Minister in the PZU SA privatization process - up to 6 weeks (by 10 June 2002)

Obtain the consent of the President of the Public Procurement Office to refrain from applying national preferences and to refrain from the duty of submitting a deposit - up to 4 weeks (by 8 July 2002)

Publish the announcement of the tender for an advisor in the Public Procurement Bulletin - up to 2 weeks (by 22 July 2002)

Bid preparation period - up to 6 weeks (by 2 September 2002) Work of the Tender Committee - up to 4 weeks (by 30 September 2002)

Publish the announcement on the result of the proceedings in the Public Procurement Bulletin - up to 2 weeks (by 14 October 2002)

Possible protests and appeals - 5 weeks (by 18 November 2002)

Prepare the attachments and sign a contract with the

advisor - up to 3 weeks (by 4 November 2002)

Audit the financial statements, actuarial, economic and financial and legal audits - at least 16 weeks after signing the contract, the deadline depends upon drawing up PZU SA's 2002 financial statements and PZU Group's 2002 consolidated financial statements, which will be accepted by the Ordinary Shareholders' Meeting of PZU SA prior to mid 2003 (March - June 2003)

Prepare the valuation and estimate of the Company's value using at least two methods - at least 14 weeks after signing the contract (March - May 2003)

Prepare the issue prospectus - at least 16 weeks after signing the contract, the deadline depends upon drawing up PZU SA's financial statements and PZU Group's 2002 consolidated financial statements (April - June 2003)

Prepare a recommendation for the detailed strategy to sell the Company's shares - at least 14 weeks after signing the contract (April - May 2003)

Submit the Company's issue prospectus to the Polish SEC - at least 18 weeks later after signing the contract; the prospectus containing the annual statements may be submitted to the Polish SEC by the end of September 2003 (June - July 2003)

Print and publish the issue prospectus - at least 27 weeks after signing the contract (July - September 2003)

Publish the analytical reports - at least 27 weeks after signing the contract (July - September 2003)

Announce the price range - at least 27 weeks after signing the contract (July - September 2003)

Hold meetings with investors, commence collecting subscriptions for the retail tranche and book building - at least 28 weeks after signing the contract (July - September 2003)

First listing of shares on the Warsaw Stock Exchange - at least 30 weeks after signing the contract (September - October 2003)

Settle and close the offering - at least 31 weeks after signing the contract (October 2003)

Final report - at least 32 weeks after signing the contract (October 2003)

Assumptions

1) [...illegible words] current privatization advisor will not be continued

2) the State Treasury Ministry will conduct tender proceedings to select a new privatization advisor according to the Public Procurement Act

3) the issue prospectus will be based on PZU SA's 2002 financial statements and PZU Group's 2002 consolidated financial statements

Acceptance of the foregoing assumptions will make it possible to prepare the sale of PZU SA's shares in a public offering diligently and accurately; at the same time, it will protract the IPO schedule considerably. (Emphasis added)

72. The Tribunal notes that pursuant to the schedule proposed by the State Treasury Minister on behalf of the »Government of the Republic of Poland« in May 2002, it was envisaged that the sale of PZU shares in a public offering would be consummated in the autumn of 2003. In the words of the Minister himself, the IPO schedule would thus be »protract[ed] considerably«.

73. To this date, it is common ground between the parties that Claimant remains the owner of 30% of the share capital of PZU and that no IPO with respect to the remaining shares of the company, in whole or in part, has taken place. The State Treasury of the Polish Republic remains owner of these shares.

C. The Treaty

74. In its Statement of Claim, Eureko requests that the Tribunal declare that the Republic of Poland has breached Articles 3(1), 3(2), 3(5) and 5 of the Treaty.

75. In its Rejoinder, the Republic of Poland asks for dismissal »for lack of jurisdiction or as inadmissible« of Claimant's claims and also denies that it has violated any provision of the Treaty.

D. The Tribunal's jurisdiction

76. The relevant provisions of the Treaty with respect to the Tribunal's jurisdiction are Articles 1 and 8 which read, in part, as follows:

Article 1

For the purposes of this Agreement:

a) the term »investments« shall comprise every kind of asset and more particularly, though not exclusively:

[...]

ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures

iii) title to money and other assets and to any performance having an economic value

[...]

v) right to conduct economic activity [...] granted under contract [...]

b) the term »investors« shall comprise with regard to either Contracting Party:

i) natural persons having the nationality of that Contracting Party in accordance with its law

ii) without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party

iii) legal persons, wherever located, controlled, directly or indirectly, by investors of that Contracting

Party

[...]

Article 8

1. Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between both parties concerned.

2. If such disputes cannot be settled within six months from the date either party requests amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal. [...]«

77. The substantive provisions of the Treaty which Claimant alleges have been breached by Respondent are :

Article 3.1:

Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

Article 3.2:

More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.

Article 3.5:

Each Contracting Party shall observe any obligations it may have entered into with regard to invest-

ments of investors of the other Contracting Party.

Article 5:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- a) the measures are taken in the public interest and under due process of law
- b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given
- c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the real value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned in any freely convertible currency accepted by the claimants.

E. The Parties' Positions

78. The parties' respective positions are described in exhaustive detail in their written submissions. These were further refined and, in certain instances, revised during the course of the written and oral phases of the arbitration. In this section of its Partial Award, the Tribunal provides a brief summary of each party's case, gleaned from the written submissions and other material filed by them, as well as from their oral pleadings.

79. It is important to state that whereas the members of the Tribunal have reviewed and considered the entirety of the written and oral submissions, arguments and evidence presented by the parties, for purposes of the present Partial Award, the Tribunal refers only to those elements of the parties' submissions and proof that it considers to be particularly apposite to its reasoning and findings. In addition to the summaries presented here, references to the parties' submissions and evidence can be found in later sections of this Award where the Tribunal sets

out its analysis and findings with respect to the issues to be determined.

80. In sum, Claimant argues that, as a result of its investment in PZU and as evidenced by the SPA and the First Addendum, it acquired rights which were entitled to protection by the Republic of Poland under the Treaty and that those rights were »frustrated« by measures of, or attributable to, the RoP. Those rights essentially pertain to the governance of PZU and to the holding of an IPO that would permit Eureko to purchase majority control of PZU.

81. Respondent, for its part, argues firstly that Eureko's claims are inadmissible since they are predicated upon contractual claims for which, under express terms of the SPA, exclusive jurisdiction resides in the competence of a »Polish public court competent with respect to the Seller«.

82. Secondly, Respondent argues that Claimant's allegations relating to the pre-First Addendum period were irrevocably waived by the First Addendum.

83. Thirdly, Respondent avers that Eureko's claims relating to the Ministries' Statement of intent to conduct an IPO and to commit to sell a further 21% stake in PZU to Eureko in such a context does not constitute an »investment« protected under the Treaty.

84. Finally, Respondent submits that Claimant, in any event, has failed to demonstrate any breach of the Treaty by the RoP.

F. Analysis and Findings

85. Several legal issues arise in this arbitration which need to be resolved by the Tribunal. As the Tribunal noted at the outset of the present Award, these issues are informed by the factual matrix which has been reviewed in an earlier section. Some of the issues, if decided in favour of Respondent, would be fatal to Claimant's case. The Tribunal will address those issues first.

86. However, before addressing any legal issue, the

Tribunal deems it important to recall **Eureko's** claim as set out in its Introductory Note to the Arbitration and its Statement of Claim.

87. In its Introductory Note to the Arbitration, **Eureko** stated:

Eureko submits to the Arbitral Tribunal a dispute with the Republic of **Poland** about an investment made by it in Powzechny Zaklad Ubezpieczen S.A. (»PZU«). The dispute is about the unfair, inequitable and discriminatory treatment by the Polish government of **Eureko's** investment and about measures taken by the Polish government by which **Eureko** has been and is being deprived of its investment contrary to undertakings given by the Polish government.

88. In its Statement of Claim, **Eureko** elaborated its initial submission and concluded that the Tribunal:

»1. Declare that the Republic of **Poland** has breached the following provisions of the Treaty:

a) Article 3(1) by failing to ensure fair and equitable treatment of **Eureko's** investments and by impairing, by unreasonable and/or discriminatory measures, the operation, management, maintenance, use and/or enjoyment of **Eureko's** investments

b) Article 3(2) by failing to accord **Eureko's** investments full security and protection which are not less than those accorded to investments of its own investors or of investors of any third State

c) Article 3(5) by failing to observe the following obligations it has entered into:

(i) Articles 3(1), 5(1), 5(2) and 6(1)(1) of the SPA

(ii) The Agreements of 20 June 2000 and 13 July 2000

(iii) Article 5 of the First Addendum,

all as specified in Part D of this Statement of Claim, and

d) Article 5 by taking measures depriving **Eureko** directly or indirectly of its investments without the conditions referred to in that Article being fulfilled.«

89. It is clear that **Eureko**, a Dutch company, has submitted to the Tribunal a claim against the Republic of Poland for alleged breaches of the Dutch-Polish BIT by Respondent.

90. The Tribunal recalls that the Kingdom of the Netherlands and the Republic of Poland, in the preamble to the Treaty agreed that, by entering into this Agreement, they intended »to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party«.

91. The Tribunal further recalls that, under the Treaty, its decision must be made »on the basis of respect for the law, including particularly this [Treaty] and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law«.

(1) Admissibility of Eureko's Claims

92. As a preliminary matter, Respondent argues that even if the Tribunal has jurisdiction under the Treaty to hear **Eureko's** claims, »it should consider those claims to be inadmissible since they are necessarily predicated upon contractual claims for which exclusive jurisdiction resides, by agreement of the parties, in the competent Polish court.«

93. As we saw earlier, the jurisdiction clause in the SPA provides that:

Conflicts between Parties arising from the Agreement which cannot be resolved by the Parties through negotiations within 30 days, shall be submitted to a Polish public court competent with respect to the Seller.^[FN5]

94. Relying principally on the decision of the *ad hoc* Committee in the Vivendi annulment case ^[FN6], Respondent submits that international law

requires that the scope and extent of the State's contractual obligations first be determined by the contractual forum before a Bilateral Investment Treaty tribunal can consider whether the State breached any obligations duly determined to exist.

95. Because Respondent, in its written and oral pleadings, has invoked as its principal authority the decision of the *ad hoc* Committee in the Vivendi annulment case, the Tribunal considers it necessary to analyze that decision in some detail.

96. As will be seen, it is the Tribunal's conclusion that Respondent's reliance upon the decision of the *ad hoc* Committee is misplaced.

97. Vivendi's concession contract between an affiliate and an Argentine province provided that contract disputes, concerning both interpretation and application, were to be submitted to the exclusive jurisdiction of the province's administrative courts. Vivendi brought arbitral proceedings under a BIT between France and Argentina alleging unfair and inequitable treatment and uncompensated measures of expropriation.

98. The first Vivendi Tribunal held that it had jurisdiction over the dispute, because Vivendi's claims were not for breach of contract but alleged a cause of action under the BIT.^[FN7]

99. On the merits, the first Vivendi Tribunal held that the actions of the province on which Vivendi relied were closely linked to the performance or non-performance of the parties under the contract. It concluded that, because of the crucial connection between the terms of the contract and these alleged violations of the BIT, Argentina could not be held liable unless and until Vivendi asserted its rights in proceedings before the province's contentious administrative courts and was denied its rights, procedurally or substantively. The Tribunal explained that it was impossible, on the facts of the case, to separate breaches of contract claims from BIT violations without interpreting and applying the contract, a task that the contract assigned to the provin-

cial courts. Thus, it dismissed the claim and remitted Vivendi to the Argentina provincial courts.

100. In the annulment proceedings on which the Republic of Poland now relies, the *ad hoc* Committee held that it was evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract. It proceeded to uphold the initial Tribunal's decision on jurisdiction. It held,

The fact that the Concession Contract referred contractual disputes to the contentious administrative courts of Tucuman did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16(4) of the Concession Contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under...the BIT; at the very least, a clear indication of an intention to exclude that jurisdiction would be required. (Para. 76)

101. On the merits, the Committee, in treating Vivendi's claims arising out of the acts of the province, annulled the holding of the Vivendi Tribunal. It stated:

As to the relation between breach of contract and breach of treaty...it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa...The point is made clear in Article 3 of the ILC Articles...: 'The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. (Para. 95)

102. The Committee continued:

In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT

and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law -in the case of the BIT, by international law [...] (Para 96)

103. The *ad hoc* Committee elaborated the foregoing holdings by setting out passages of the judgment of a chamber of the International Court of Justice in the *ELSI* case. It added, by way of *obiter dictum*, as stressed vigorously by Respondent in the present case that:

In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract. (Para. 98)

104. But the Committee went on to explain that:

On the other hand, where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties may be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state ...cannot operate as a bar to the application of the treaty standard. At most, it might be relevant... in assessing whether there has been a breach of the treaty. (Para. 101)

105. The *ad hoc* Committee continued and held that:

It is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of the BIT, to dismiss the claim on the ground that it could have or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties. (Para. 102)

106. It then added that:

A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterization of its conduct as internationally unlawful under a treaty. (Para. 103)

107. The *ad hoc* Committee further observed that:

[...] It is one thing to exercise contractual jurisdiction...and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in Article 3 of the BIT. (Para. 105)

108. The Committee held that the initial Tribunal »had jurisdiction to base its decision on the Concession Contract, at least so far as necessary in order to determine whether there has been a breach of the substantive standards of the BIT«. (Para. 110)

109. The Committee concluded that the conduct alleged, if established, could have breached the BIT. It was open to the Claimant to claim that the acts complained of, taken together, amounted to a breach of the BIT. In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, »was obliged to consider and decide it«. (Para. 112)

110. Thus, the case, insofar as elements of the award of the initial Tribunal were annulled, was remitted by the *ad hoc* Committee for consideration by a fresh BIT Tribunal. Those proceedings are now in progress.

111. The Tribunal has recalled at such length the decision of the *ad hoc* Committee in the annulment proceedings in Vivendi because a fuller exposition than found in the pleadings of Respondent is required to understand and appraise it.

112. It is clear to this Tribunal that the decision of the *ad hoc* Committee in Vivendi, as applied to the facts of the case now before this Tribunal, authorizes, and indeed requires, this Tribunal to consider whether the acts of which Eureko complains, whether or not also breaches of the SPA and the

First Addendum, constitute breaches of the Treaty.

113. As the Tribunal recalled earlier, Claimant in the present arbitration advances claims for breach of the Treaty and, applying the teaching of the decision of the *ad hoc* Committee in the Vivendi annulment case, every one of those claims must be heard and judged by this Tribunal.^[FN8]

114. Respondent's plea of inadmissibility of Eureko's claims is, accordingly, dismissed.

(2) Attribution to the Republic of Poland of the SPA and its First Addendum or Actions Taken in respect of them

115. As the Tribunal noted earlier, on 18 March 1999, in furtherance of its privatization policy, the Republic of Poland, acting through its Council of Ministers, adopted a resolution consenting to the privatization of PZU including, initially, the sale of a block of 30% of the shares of PZU by public tender.

116. In accordance with that resolution, the State Treasury of the Republic of Poland proceeded to an international tender and published a public invitation in the Rzeczpospolita and Financial Times newspapers.

117. Following negotiations conducted with Eureko, the »Seller«, as legal owner of the PZU shares, signed the SPA as well as the subsequent First and Second Addenda.

118. In the SPA as well as the First and Second Addenda, the Seller is described as »the State Treasury of the Polish Republic represented by the State Treasury Minister of the Polish Republic«. The seal of the Republic of Poland is imprinted on the cover pages of the SPA and of the Addenda.

119. Under the Polish Civil Code, the State Treasury is accorded legal personality and, in civil law relationships, is considered the subject of rights and duties which pertain to State property.

120. The relevant Articles of the Polish Civil Code

provide as follows:

Article 33

Legal persons shall be the State Treasury and those organizational entities upon which special provisions of law confer legal personality.

Article 34

The State Treasury shall be considered, in civil law relationships, the subject of the rights and duties which pertain to the State property that does not belong to other State legal persons.

121. Recognizing that these articles of the Polish Civil Code could be construed to support an argument that the State Treasury Minister, as a statutory representative of the State Treasury, in concluding the SPA and the Addenda with Eureko, entered into a pure civil law relationship which did not engage the responsibility of the Republic of Poland, the Tribunal, after it began its deliberations, wrote to the parties and asked for additional submissions in respect of this specific issue, which had not been fully considered in the written or oral pleadings. In its deliberations, the Tribunal examined the question of attribution to the Polish Government of acts of the State Treasury Minister in particular depth, with the benefit of the exceptional knowledge and insight of its distinguished member who is steeped in Polish law.

122. The Tribunal, in its letter of 22 November 2004, described that issue as follows:

The first contracting Party to the SPA and its First Addendum is »The State Treasury of the Republic of Poland represented by the Minister of the State Treasury« (the »Seller«).

Having regard, in particular, to Articles 33 and 34 of the Polish Civil Code and to the ILC Articles on Responsibility of States for Internationally Wrongful Acts (**Exh. R-1**), to what extent, if any, are the SPA and its First Addendum, or actions taken in respect of them, whether by PZU, the Minister or

Ministry of the State Treasury, or the Government of Poland, attributable to the [Respondent]?

123. In its response to the Tribunal's question, Respondent argued:

[...]»The Minister of the State Treasury has the dual role of exercising state authority in its executive functions but also of acting as a private commercial actor in certain transactional matters (where the Minister of the State Treasury is treated in the same manner as any other private party).

It is in this latter capacity - and only in that capacity - that the concerned Ministers of the State Treasury negotiated, executed and performed the SPA and the First Addendum. The Minister was a business partner of Eureko, and the SPA and the First Addendum constituted civil law agreements between two equal and equally sophisticated commercial actors. Under Polish law, actions undertaken by the Minister of the State Treasury with respect to the SPA and its First Addendum are not the result of the exercise of governmental executive powers and thus are not attributable to the ROP. «^[FN9] (*Emphasis added*)

124. Respondent's submission leads to the conclusion that the SPA and the Addenda constituted civil law agreements between two business partners which fall exclusively within the sphere of the exercise of civil law rights and which are not at all connected with the exercise by the State Treasury of governmental powers.

125. The Tribunal cannot accept Respondent's submission which flies in the face of well recognized rules and principles of international law.

126. The Tribunal is an international arbitral tribunal constituted under the Treaty. As noted earlier in this Award, it must decide the dispute between the Parties on the basis of the Treaty and the »universally acknowledged rules and principles of international law«.

127. In the perspective of international law, it is

now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State.

128. Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts is crystal clear:

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

129. In the view of the Tribunal, there can be no doubt that the Minister of the State Treasury, in the present instance, when he sold to the Eureko Consortium 30% of the State Treasury's shareholding interest in PZU by virtue of the SPA and undertook in the First Addendum to carry out an IPO as to an additional 21% of the shareholding, or, under the Second Addendum, sell it outright to Eureko, was acting pursuant to clear authority conferred on him by decision of the Council of Ministers of the Government of Poland in conformity with the officially approved privatization policy of that Government. As such, the Minister of the State Treasury engaged the responsibility of the Republic of Poland. Moreover, the record before the Tribunal is spangled with decisions of the Council of Ministers in respect of the PZU privatization which authorize the State Treasury Minister or Ministry to take actions, some of which the Tribunal concludes later in its Award were in breach of Poland's obligations

under the Treaty.

130. The Tribunal calls in aid of its conclusion on this issue the following extracts from Professor Crawford's Commentary in his capacity as Special Rapporteur on State Responsibility of the ILC. Professor Crawford wrote:

It is irrelevant for the purposes of attribution that the conduct of a state organ may be classified as »commercial« or as »*acta jure gestionis*«. ^[FN10]

131. Professor Crawford, after reviewing decisions of international tribunals, added in his Commentary that the State was responsible for the acts of:

[...] all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law. ^[FN11] (*Emphasis added*)

132. Professor Crawford further observed that the principles of attribution are cumulative so as to embrace not only the conduct of any State organ but the conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of governmental authority. It embraces as well the conduct of a person or group of persons if he or it is in fact acting on the instructions of, or under the direction or control of, that State. As the Commentary to the Articles on State Responsibility state, these principles are »intended to take account of the increasingly common phenomenon of para-statal entities...as well as situations where former State corporations have been privatized but retain certain public or regulatory functions«. ^[FN12]

133. In this context, the Tribunal quotes with approval the view of the Polish scholar, A. Wolter, to which it was referred by Claimant in its Additional Brief:

In the prevailing view, the State Treasury is not a legal entity separate from the State. The State Treasury is the State. However, in accordance with

the established tradition, we use the term »State« if we deal with the taking of sovereign actions (imperium), while we apply the term »State Treasury« if we refer to the State's exercise of its ownership rights (dominium).

134. In brief, whatever may be the status of the State Treasury in Polish law, in the perspective of international law, which this Tribunal is bound to apply, the Republic of Poland is responsible to Eureko for the actions of the State Treasury. These actions, if they amount to an internationally wrongful act, are clearly attributable to the Respondent and the Tribunal so finds.

(3) *What Is Eureko's Investment Entitled to Protection Under the Treaty?*

135. Respondent sought to demonstrate that Claimant's only investment in Poland was its 20% shareholding in PZU purchased from the MOST by virtue of the SPA, an investment which it still holds today and which has increased in value.

136. Claimant, for its part, maintains that its investment consists not only of the 20% shares which it obtained pursuant to the SPA but also the rights derived from those shares, corporate governance rights as contained in the SPA and the First Addendum, the obligation of the RoP under the First Addendum to establish a timetable if it proved impossible to have an IPO by the end of 2001, the additional right under the First Addendum to acquire in the context of an IPO an additional 21% of shares in PZU and the right, under the Second Addendum, to acquire directly from the State Treasury an additional 21% of shares in PZU if the relevant permissions were obtained.

137. The Tribunal notes that the term »investment« used in the Treaty is very broad. Article 1 of the Treaty provides that, for the purposes of this Agreement:

a) the term »investments« shall comprise every kind of asset and more particularly, though not exclusively:

- (i) movable and immovable property as well as any other rights in rem in respect of every kind of assets
- (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures
- (iii) title to money and other assets and to any performance having an economic value
- (iv) rights in the field of intellectual property, technical processes, goodwill and know-how
- (v) rights to conduct economic activity, including rights to prospect, explore, extract and win natural resources granted under contract, administrative decisions or under the legislation of the Contracting Party in the territory of which such activity is undertaken.

138. The Tribunal will now examine, in turn, the different rights which Eureko derived from its shareholding in PZU and determine whether they amount to investments entitled to protection under the Treaty.

(i) Corporate Governance Rights

139. As the Tribunal noted earlier, while the SPA, including its Appendices, did not confer on the Eureko Consortium the right to control and operate PZU, it did confer upon it, in clear terms, a measure of influence in the control and operation of PZU that surpassed that implied by its 30% shareholding.

140. The Tribunal recognizes that provisions of the SPA, and its many Appendices pertaining to corporate governance, clearly granted Eureko the ability to exercise substantial influence over the management and operation of PZU.

141. The Tribunal notes in particular that, in order to be able to implement the Development Plan (See Article 13 of the SPA and Appendix 5) and to transfer its know-how, Eureko needed to exercise such substantial influence.

142. Having considered the totality of the evidence,

in particular the testimony of Mr. Jansen, the Tribunal finds that these corporate governance rights were not contingent. They were real rights granted in clear terms to Eureko by its contractual partner, the State Treasury of the RoP. The Tribunal finds that these rights were systematically frustrated by Respondent after execution of the SPA.

143. However, for purposes of the present facet of its Award, the task of the Tribunal does not end here. The Tribunal must now determine whether those rights which have been violated by Respondent qualify as an investment entitling Eureko to protection under the Treaty. ^[FN13]

144. The Tribunal has a measure of hesitation in finding that Eureko's corporate governance rights under the SPA, standing alone, qualify as an investment under the Treaty. On balance, however, it finds that those rights, critical as they were to the conclusion of the SPA and hence to the making of Eureko's very large investment, do so qualify.

145. While investments under the present Treaty may include assets that are not »balance sheet assets«, in the opinion of the Tribunal, to qualify as investments entitled to protection, provisions for the governance of PZU which are rights derived from its shareholding must have some »economic value«. Disassociated from those rights derived from the promotion and holding of the IPO to which the Tribunal now turns, the corporate governance rights, as such, do not have any tangible, readily calculated »economic value«. Nevertheless, since the grant to Eureko of corporate governance rights markedly more extensive than those that followed from its shareholding was a key element of the investment, without which it appears that there would have been no investment at all, the Tribunal concludes that those rights have some economic value and are entitled to protection under the Treaty. ^[FN14]

146. At the same time, the violations of its corporate governance rights of which Eureko complains

took place before the conclusion of the first Adendum. By the force of the reasoning and holding expressed elsewhere in this Award (*infra*, paragraphs 161-184), it follows that any claim of the Claimant in respect of those violations has been waived.

(ii) Eureko's rights in respect of an IPO

147. The Tribunal recalls Article 3.1 of the SPA which provides in part as follows:

1. The Buyers are aware of and fully support the intention of the Seller and the Company to publicly trade, through an Initial Public Offering (hereinafter referred to as the »IPO«), a part or all of the shares of the Company as soon as it is practicable, however, no later than by the end of the year 2001, unless it is impossible to carry out the IPO in the above specified period due to market conditions unsatisfactory to the Seller. The Buyers and the Seller undertake to take all actions which may be required to be taken in connection with the preparation for, and the realization of, such IPO. In addition, the Buyers and the Seller undertake to take all actions with proper care (with consideration given to the professional nature of business, in the event of the Buyers), in particular by exercising their voting rights arising from the shares or otherwise by their influence on the Company or its governing bodies provided for in the Company's Articles of Association, to ensure that the Company takes all actions necessary in connection with the preparation for, and the realization of, the IPO within said period.

[...]

2. The Seller intends to sell all the remaining shares of the Company (which shares were not otherwise allocated to the employees of the Company or to a reprivatization reserve, or the sale of which is not otherwise limited by applicable law) in the IPO, and successive public offerings, and to list the shares on the Warsaw Stock Exchange or in the form of depository receipts on other stock exchanges in the world. The Buyers and the Seller un-

dertake to apply proper care in order to cause that the remaining Company shares are admitted to public trading in the event of a successful IPO.

3. The Seller does not intend to sell a strategic block of shares of the Company through public trading to a strategic investor other than the Buyers, [...] (*Emphasis added*)

148. Claimant maintains that Article 3.1 of the SPA contains both a contractual obligation on the part of the parties to have the IPO and, more particularly, very specific obligations in this regard.

149. Respondent avers that the language of Article 3.1 of the SPA did not oblige the MoST to hold the IPO before the end of 2001. On the contrary, Respondent submits, »it expressly permitted the MoST not to conduct an IPO if it felt that the market conditions for such an IPO were unsatisfactory to it«.

150. The Tribunal agrees with the RoP. Article 3.1 refers, in terms, to the »intention of the Seller to carry out an IPO »as soon as it is practicable«, »unless it is impossible to carry out the IPO in this period »due to market conditions unsatisfactory to the Seller«. Article 3.2 also refers to the »intention of the Seller« to sell the remaining shares of the Company in the IPO and successive public offerings.

151. While it may well have been, for Eureko, more than »a theoretical intent« in the light of the announced privatization strategy of the RoP^[FN15], the wording of the Article which the Tribunal must interpret does not rise to the level of a firm commitment or create a legal obligation for the Respondent. In the opinion of the Tribunal, it is no more than a statement of intent which does not amount to a right entitled to protection under the Treaty. Clearly, Eureko had a contingent right and an investor cannot be deprived of a contingent right within the reach of the Treaty as long as the contingency has not been realized.

152. However, the preamble and substantive provisions of the First Addendum demonstrate clearly that the statement of intent which had been agreed by the parties in the SPA had now crystallized and become a firm commitment of the State Treasury.

153. The preamble to the First Addendum, in paragraph 2, confirms the objective of the IPO agreed by the parties.

To confirm and agree on steps to be taken in order to implement the intentions and objectives that have been agreed by the parties in relation to intentions and objectives that have been agreed by the Parties in relation to the privatization of PZU and to fully address the underlying roles and positions of the State Treasury and Eureko in the process preceding the Initial Public Offering.

154. It continues, in paragraph 3, to speak of »the acquired rights and mutually assumed obligations of both main shareholders in order to assure the next phase of privatization through IPO to take place before the end of December 2001«.

155. In paragraph 4, the First Addendum's Preamble refers to the »commitment of the State Treasury to sell and of Eureko to buy 21% of the shares of PZU in the IPO«.

156. By the terms of Article 5.1 of the First Addendum, the State Treasury binds itself »to exercise due care and diligence in order to have the IPO concluded before December 31, 2001«. If the IPO is not concluded by then, Article 5.3 provides that »the Parties unconditionally undertake to adopt a new schedule for the IPO...«. Another unconditional undertaking of the State Treasury is set out in Article 5.4. The repeated Article 5.4 contains still a further undertaking of the State Treasury: to assist Eureko to obtain the permit of the Ministry of Finance to allow Eureko to become the majority, 51% owner of PZU.

157. Consequently, the Tribunal finds that, under the First Addendum, the Republic of Poland con-

tracted obligations and Eureko acquired rights derived from its shareholding in PZU which were entitled to protection under the Treaty. If these rights were breached by conduct attributable to the Respondent, Claimant is entitled to seek remedies under the Treaty.

158. The Tribunal finds confirmation in the Second Addendum of its present conclusion that the First Addendum conferred on Eureko acquired rights in respect of the conduct of the IPO and the obligations of the Republic of Poland in that respect.

159. The Second Addendum records that Eureko »has received the consent of the Minister of Finance to acquire more than 50% of the shares of PZU« [...] It refers in preambular paragraph (G) 3 to »the acquired rights and mutually assumed obligations of the parties« to assure the IPO.

160. Since the Second Addendum did not come into force, its provisions did not. However, its reference to the »acquired rights and mutually assumed obligations of the parties«, a reference to rights in respect to the IPO already assumed and already in force, further demonstrates the recognition of the State Treasury that Eureko has rights in respect of the IPO that are not contingent but acquired and vested.

(4) Effect of the Waiver Clause in the First Addendum

161. For purposes of the present section of its Award, the Tribunal recalls the following provisions in the First Addendum:

By concluding this Addendum the Parties intend:

1. To cause termination (without the right of repeated lodging of claims) of all outstanding controversies, disputes and court actions that have grown among them in relation to the Agreement; and

[...]

Article 1

1.1 The fundamental premise and the condition precedent of this Addendum is that the Parties wish to settle and terminate (without the right of repeating lodging of claims) any and all claims and controversies that have arisen among them and in connection with certain individuals in relation to the Agreement.

1.2 The Parties shall as soon as practicable cease and terminate all legal actions pending, public statements and adverse media activities in Poland and at international level.

1.3 The Parties undertake that till April 6, 2001 they shall cause actions necessary to effective withdrawal (including the waiver of all claims pursued, without the right of repeated lodging thereof) of all summons and claims with respect to the Agreement, as well as, all other summons and claims that have been filed in connection with the resolutions of the general shareholders' meeting of the Company and lodged by the Seller, the Buyers, or by one or more of the following persons: Boguslaw Kott, Maciej, Bednarkiewicz, Jose Martins da Costa, Ernst Jansen, Jerzy Zdrzalka, Fred Hoogerbrug, Rafal Mania and Janusz Zawila - Niedzwiecki. To this end, the Parties undertake to file respective motions and filings till April 6, 2001 and submit to each other the evidence of such actions. (*Emphasis added*)

162. Relying on the terms of the First Addendum as well as the testimony some of Claimant's own witnesses ^[FN16], Respondent submits that any breaches of the Treaty alleged by Eureko which predate the date of the First Addendum, 3 April 2001, have been fully and unconditionally waived upon its execution.

163. The Republic of Poland argues that Article 1 was a free standing, separate agreement within the Addendum executed within a short and specified time period as a condition precedent to the rest of the Agreement.

164. Finally, the Respondent avers that the parties

specifically expressed their intent to terminate all outstanding claims and controversies, without the right of repeating lodging of claims, on three different occasions in the First Addendum.

165. Claimant, quoting from the six full paragraphs of the Preamble, asserts that these paragraphs are all »intrinsically interrelated« and that the First Addendum was not a separate settlement agreement to which was added a series of changes to the SPA. By concluding the First Addendum, says Claimant, the Parties intended to accomplish all of the objectives specified in the Preamble.

166. Eureko further submit that »it is absolutely inconceivable that Eureko would have given up its litigation rights if it were not for the RoP's undertaking to bring the IPO back on the road«. Eureko concludes that since the IPO was not »brought back on the road«, its litigation rights under the Treaty revived.

167. Finally, relying on the exception of non-performance, (*exceptio non adimpleti contractus*), Claimant argues that the RoP's non-performance of the remaining provisions of the First Addendum vitiated the waiver and that it is not barred from raising pre-First Addendum claims again.

168. It is not disputed that both Parties actually performed their obligations under Article 1 to effectuate a full and final waiver and release of all controversies between them as of 3 April 2001 and that all lawsuits and claims between the Parties, whether pending before the Polish courts or in an international forum, were withdrawn and were not pursued.

169. The Tribunal recognizes that if, during the negotiations, the State Treasury had informed Eureko that, by executing the First Addendum, it waived any claims that may have arisen pursuant to Article 1, but that the State Treasury remained free to ignore or subvert its obligations to conduct the IPO pursuant to the remaining articles of the First Addendum, there would have been no First Ad-

dendum. The State Treasury did not so state, but it has so acted.

170. Nevertheless, Article 1 clearly states that the mutual release of any and all claims that had arisen among the parties in connection with the SPA was the »fundamental premise and condition precedent« of the First Addendum.

171. If the Parties had wanted to make the mutual release of any and all claims a condition subsequent of the First Addendum, they could have so provided and their experienced legal advisors would have had no difficulty in drafting such a clause.

172. The Tribunal further notes that Article 1 was the only provision of the First Addendum which did not amend the SPA and which operated in its own terms.

173. The interpretation of Article 1 by the Tribunal leads, on balance, to the conclusion that any breaches, contractual or under the Treaty, alleged by Claimant which predate 3 April 2001 have been fully and unconditionally waived by both parties upon execution of the First Addendum.

174. The Tribunal notes that the unconditional waiver contained in Article 1 of the First Addendum as regards BIT claims is effective and in accordance with international law which recognizes that a party may waive certain rights entitled to international protection. The Second and Third Restatements of Foreign Relations of the United States are clear on this point:

A waiver or settlement by an alien of a claim against a state, made after an injury attributable to that state but before espousal... is effective as a defense on behalf of the respondent state, provided the waiver or settlement is not made under duress.

A state's claim against another state for injury to its national fails if, after the injury, the person waives the claim or otherwise reaches a settlement with the respondent state.

175. International law thus recognizes that an investor may, after a claim against a State has arisen, enter into a settlement agreement with that State and commit to a final waiver of those claims. The State can subsequently rely on that waiver and assert it as a defense against the investor, should such investor attempt to raise those claims again.

176. The Tribunal must now determine whether the RoP can rely on the Article 1 waiver because it has allegedly not performed its own obligations under the First Addendum. In other words, is the exception of non performance applicable, as Claimant contends?

177. Without deciding whether the exception of non performance is a maxim of interpretation or a rule of international law, the Tribunal is of the view that the exception cannot assist Claimant because it essentially applies to cases of simultaneous or conditional performance.

178. For example, Article 7.1.3 of the UNIDROIT principles of International Commercial Contracts provides that, »Where the parties are to perform simultaneously, either party may withhold performance« if the other party is not willing and able to perform.

179. The exception of non-performance thus relates to the simultaneous performance of particular obligations, i.e. mutuality, which is exactly the case with Article 1 of the First Addendum.

180. According to its terms, both parties had to perform simultaneously, which they did, and on 3 April 2001, all contract and other claims were terminated, not suspended.

181. As the Tribunal noted earlier, if the parties had intended the waiver to be conditional upon subsequent performance of all of their obligations under the First Addendum, that Addendum would have been drafted in a completely different way. Indeed, such a waiver would not have been a waiver at all, and far from excluding the repeated bringing

of claims, it would have expressly contemplated that possibility. Claimant's position inverts the meaning and purpose of Article 1 of the First Addendum.^[FN17]

182. Before concluding this section of its Award, the Tribunal wishes to make clear that any pre-First Addendum actions of, or attributable to, the RoP which violate the Treaty remain facts of which the Tribunal can take account in assessing the whole of the conduct and misconduct of the Respondent, whether or not those facts of themselves are actionable.

183. Furthermore, the Tribunal will examine in a later section of its Award whether Respondent, by its own actions and words that postdate the First Addendum, such as, the appeal by the State Treasury Minister against the prosecutor's dismissal of the Kluzek claim, the April 2, 2002 Decision of the Council of Ministers setting out a change of policy so as to retain Polish control of PZU, and the letter of May 22, 2002 of the State Treasury Minister to the CEO of Eureko affirming the Decision of the Council of Ministers »about the need to retain control« over PZU and informing the ambassadors of the EU »about the change in privatization strategy« constitute straightforward violations of the essence of the SPA and the First Addendum and of Poland's obligations under the Treaty.

184. Even if as the Tribunal has found, the waiver clause is treated as effective, it has no application to claims and controversies that »have [not] arisen« as of the date of its signing, notably to claims of violations of the BIT that were not in issue at the conclusion of the First Addendum.

(5) Do »measures« include actions and omissions?

185. The RoP raises another legal argument which the Tribunal must resolve. Relying principally on the wording of Article 8(1) of the Treaty which refers to a dispute between the Parties relating to the effects of a »measure taken« with respect to the essential aspects pertaining to the conduct of business as well as the use of the word »measure« in

Article 5, Respondent avers that this language was meant to exclude omissions from the ambit of the Treaty.^[FN18]

186. The Tribunal cannot accept Respondent's restrictive interpretation. It is obvious that the rights of an investor can be violated as much by the failure of a Contracting State to act as by its actions. Many international arbitral tribunals have so held.^[FN19]

187. Furthermore, several contemporary sources of international law, including the UN International Law Commission in its fundamental and extended labors on State Responsibility, confirm that »measures taken« include omissions.

188. Professor Crawford, the last of a series of distinguished Special Rapporteurs of the Commission on that topic, in the Commission's authoritative Commentary on the Articles, wrote:

(i) An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both.^[FN20]

(ii) [...] the term »act« is intended to encompass omissions [...].^[FN21]

(iii) Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.^[FN22]

189. Consequently, the Tribunal concludes that the investment of the Eureko consortium in the Republic of Poland can be violated by actions and omissions of the latter which are found to be in breach of the Treaty.

(6) The Merits of the Claimant's Case Under the Treaty

190. In the opinion of the Tribunal, the Claimant's case is justified in substance. The Republic of Poland violated the Treaty by actions and omissions of the Council of Ministers and the Minister of the

State Treasury which frustrated its investment in PZU.

(i) Violation by Respondent of Claimant's Investment

191. While, in its written and oral submissions, Claimant presented an extensive list of acts^[FN23] and omissions of Respondent which, it sought to demonstrate, were all in violation of the Treaty, it is the view of the Tribunal that, essentially, the wrongful conduct of the RoP which engages its responsibility under international law consists of its abrupt about face at the end of 2001 and the beginning of 2002 in respect of the privatization strategy which it had approved by Resolution in March 1999 and, on the basis of which, the Eureko Consortium decided to invest in Poland by purchasing, initially, a 30% minority shareholding position in PZU.

192. The genesis of Eureko's investment in Poland begins with the decision of the Council of Ministers of the Government of Poland on 18 March 1999 to privatize PZU. Pursuant to this Resolution, the Council of Ministers:

»[...] consent[ed] to the privatization of Powszechny Zakład Ubezpieczeń and it accepted the privatization strategy including the sale of a block of 30% of the shares of the Company [...], to a sector investor or to a group of investors that would include sector investor [...] and the sale of the block of shares remaining in the hands of the State Treasury [...] in an offer announced publicly, no later than in 2001.« *(Emphasis added)*

193. The formal decision of the Polish Council of Ministers contained four elements:

- (i) a sale of a block of 30%
- (ii) to a sector investor or a group of investors including a sector investor; and
- (iii) the sale of the remainder of PZU's shares by the State Treasury under an IPO,
- (iv) to take place no later than in 2001.

194. The Tribunal accepts the evidence of Eureko's witnesses that when Eureko decided to invest in PZU and execute the SPA it was on the basis of these four elements of the privatization strategy of PZU adopted by the RoP's Council of Ministers.^[FN24]

195. The implementation of its privatization strategy by the RoP is further evidenced not only by Article 3.1 of the SPA which the Tribunal reviewed earlier as well as corporate governance rights for Eureko that far exceeded those implied by its shareholding but also, by way of example, by the following provisions of the SPA:

Article 3.3

The Seller does not intend to sell a strategic block of shares of the Company through public trading to a strategic investor other than the Buyers, which investor is the Buyer's direct or indirect competitor in the market, with the exception of the sale to insurance companies, banks, and financial institutions which purchase the Company shares as a portfolio investment. Every instance of the sale of a block of the Company shares exceeding 5% of the share capital of the Company in public trading to an investor acting directly, or to an investor which the Seller knows acts indirectly or in cooperation with another investor or investors aiming at purchasing the Company shares, shall require the Buyers' prior consent which may not be unreasonably withheld. If the Seller violates the foregoing limitation concerning the sale of said 5% of shares in public trading, the Buyers will no longer be bound by the limitation concerning the sale of the Shares, as referred to in Art. 4 § 6 item 2 point 1(i). If the Buyers decide to sell all the Company shares held by them and their subsidiaries to an independent third party, then, after having effected such a sale, the Buyers will no longer be bound by the remaining limitations provided herein.

Article 5 Par. 2.2 :

Moreover, the Parties undertake to ensure (by exer-

cising their voting rights arising from the shares or otherwise by the parties' influence on the Company) that after the first listing of the Company shares on the Warsaw Stock Exchange, the composition of the Supervisory Board is changed in such a manner that the Seller will appoint two members, the Buyers will jointly appoint four members, while the remaining three members of the Supervisory Board will be elected by the General Meeting pursuant to the provisions of the Commercial Code, with the reservation that one member of the Supervisory Board should be an employee of the Company, and two members should meet the criteria of the so-called »independent members of the supervisory board« in accordance with the international criteria applicable in this respect.

196. Even though, as the Tribunal found earlier in the present Award, the SPA of itself, in terms, did not create a legal obligation for the Respondent to carry out an IPO of some or all of the remaining shares of PZU, the Tribunal finds that Eureko was fully justified, at the time that it entered into the SPA, in believing that the RoP would honour and abide by the four elements of its privatization strategy embodied in the Resolution of 18 March 1999.

197. In further support of its finding, the Tribunal notes the introductory paragraph of the PZU Development Plan, Appendix No. 5 to the SPA. It reads as follows:

Within a period of two years PZU will make further progress on its way to become an independent modern private listed company owned by a Consortium and institutional and private investors. This fact, allied to the significant external market developments and the necessity to modernise the organisation will require a transformation of PZU into a modern customer focused company. (*Emphasis added*)

198. The evidence before the Tribunal reveals that within a few months after execution of the SPA, the privatization of PZU became a major political issue in Poland and the strategy announced in March

1999 came under attack.

199. The Tribunal finds that the events of that period are thoroughly and accurately traversed by the Poland's Supreme Audit Chamber in its Report of September 2003. Therefore, the Tribunal quotes the following paragraphs of that Report which it endorses without any reservation:

2.1 From August 2000 through 2002 (i.e. for approximately 20 months), the three successive State Treasury Ministers changed their principles for conducting the second PZU S.A. privatization stage. Differences between individual ideas primarily involved determining the influence which the purchaser of a 20% stake at the first privatization stage - i.e. Eureko B.V. - was to exert over the management of that Company. According to the Supreme Audit Chamber, the changes referred to above, which were in some instances made without Eureko's approval and in contradiction to the terms set forth in the Privatization Agreement and the agreements concluded, were responsible for the protracted conflict between the State Treasury Minister and the investors. The conflict in question was largely responsible for the failure to proceed to the PZU S.A. second privatization stage.

2.1.1 From August 2000 through January 2001, in an attempt to gain greater influence over the management of PZU S.A., during Extraordinary Meetings of Shareholders of PZU S.A., at which shareholders were due to appoint the governing bodies of that Company, the State Treasury Minister acted in breach of the Agreement and the agreements concluded with the members of the Consortium. In particular, despite objections from the investors, a representative of the State Treasury Minister voted in favour of deleting an item on the agenda for the Extraordinary General Meeting of Shareholders, which involved appointing the Chairman of the Supervisory Board, and at subsequent Extraordinary Meetings of Shareholders, he decided to dismiss representatives of the Consortium from the Supervisory Board, and subsequently procured that shareholders appoint a Supervisory Board whose com-

position breached the arrangements made in the Agreement. In effect, it proved impossible to appoint the Chairman of the PZU S.A. Supervisory Board between June 30, 2000 and April 3, 2001; and between January 8, 2001 and April 3, 2001 the composition of the PZU S.A. Supervisory Board was not approved by the Eureko-BIG BG consortium. Moreover, in November 2000, the State Treasury Minister filed a statement of claim, petitioning the court to declare the Privatization Agreement void. The main reason why the State Treasury Minister resorted to court action was that he had discovered that investors purchasing shares in PZU S.A. had misled the State Treasury Ministry as to their real reasons for purchasing shares in that Company. However, according to the Supreme Audit Chamber, the justification for the statement of claim may be deemed questionable with regard to fairness (of which more on pp.23 to 25)

2.1.2 In August and September 2000, the privatization adviser to the State Treasury Minister was unable to make preparations for launching a public offering for PZU S.A. shares, as PZU S.A. subsidiaries did not provide it with the necessary documents. Therefore, in October 2000, the Adviser suspended the said preparations. In view of the above, the Chamber takes an unfavourable view of the conduct of the State Treasury Minister who, contrary to his assurances, did not meet the Adviser and did not instruct it as to the further privatization preparation schedule. According to the Supreme Audit Chamber, the State Treasury Minister actually suspended the Advisor's work for a period of over 5 months (of which more on pp. 25 to 27)

200. As the Tribunal noted in an earlier section of the present Award in its narration of the factual background and review of the key documents, as a result of the involvement of a new Minister of the State Treasury, Mrs. Aldona Kamela-Sowinska, the Parties to the SPA executed an important First Addendum on 3 April 2001 seeking to put an end to their acrimonious relationship.

201. The Tribunal has already found that, under the

clear terms of the First Addendum, the statement of intent of the RoP in the SPA to carry out an IPO of PZU became a firm and binding commitment of the State Treasury. The RoP was now legally committed to the implementation of the last two elements of its privatization strategy.

202. As of 3 April 2001, the State Treasury was committed to conclude the IPO before 31 December 2001 and to grant the Eureko Consortium a controlling majority (51%) of the PZU shareholding. In the event the IPO was not concluded before the end of 2001, the Parties covenanted »unconditionally« that they would adopt a new IPO schedule.

203. After the First Addendum was signed, in the words of Claimant, »a period of fruitful cooperation arrived which was to last until November 2001«. Eureko has expressly stated that it has no claims against Respondent for violation of the Treaty during that period.

204. After the atrocities of 11 September 2001 in the United States, an IPO of the Government owned PZU shares as envisaged in the First Addendum became problematic. The State Treasury Minister thus presented a proposition to the Council of Ministers for its consent »to a non public sale of up to 21% of the shares of PZU« to Eureko. At its session of 25 September 2001, the Council of Ministers granted its consent to the State Treasury Minister's proposal.

205. Accordingly, a Second Addendum to the SPA was executed by the Parties on 4 October 2001 implementing the resolution of the Council of Ministers referred to in the previous paragraph.

206. The Tribunal notes that, if the Second Addendum had been implemented, the PZU privatization strategy of March 1999 would, in effect, have been consummated. However, the provisions of the Second Addendum never entered into force because the State Treasury Minister withdrew from the Agreement.

207. The evidence before the Tribunal demonstrates that, shortly after the execution of the Second Addendum the RoP, elected to alter in a fundamental way its PZU privatization strategy. This change frustrated Eureko's investment in PZU.

208. Although this change in the RoP's privatization strategy, manifested principally by its decision not to relinquish to »foreign hands« the control of the Polish state in PZU, was only confirmed officially by the Council of Ministers in April 2002, the Tribunal has identified actions of the then Minister of the State Treasury, Mr. Wieslaw Kaczmarek, before April 2002, which clearly foreshadowed this volte-face.

209. Thus, in November 2001, Minister Kaczmarek refused to sign the prospectus which had been sent to him with the clear message of his advisors that:

It is imperative that [the prospectus] be filed with the SEC by no later than November 26, 2001. If the prospectus is filed at a later date, you will not be able to execute the share purchase transaction by Eureko B. V. due to the expiry of the prospectus as of the end of this year.

210. Although the Minister sought to justify his refusal to sign the prospectus because of the alleged forgery of Mr. Kluzek's signature on the document, the Tribunal finds very significant the statement which he made to Reuters the day after the prospectus should have been filed, on 27 November 2001:

Today the Minister of the State Treasury is in an ambiguous situation, when he himself has doubts whether he should unconditionally give up on participation in control over the largest financial group in Poland and he was not intending to prolong the Eureko's exclusively for the acquisition of 21 % of shares of the Polish insurer.^[FN25]

211. Having reviewed the totality of the evidence on the so-called Kluzek »forgery«, including the testimony of Mr. Montkiewicz, the Tribunal finds

that, if the Minister of the State Treasury refused to sign the prospectus in November 2001, it was because he knew that it would lead to the acquisition by Eureko of an additional 21% of the shares of PZU in accordance with the RoP's original privatization strategy which the Government had decided to change. The furor over the charge of forgery by Mr. Kluzek appears to the Tribunal more as pretext than motivation.

212. During the same time frame, the Minister of the State Treasury, Mr. Kaczmarek, sent to the Council of Ministers a request for the consent to change the PZU privatization strategy. The terms of this request were not disclosed to the Tribunal by the Respondent. However, it is referred to in the Report of the Supreme Audit Chamber in the following terms:

Meanwhile, in November 2001 and at the beginning of 2002, the State Treasury Minister submitted a proposal for redefining the PZU S.A. privatization strategy. One of the main points of the proposal involved retention by the State Treasury of a substantial stake, which would enable it to maintain full control of the PZU Group, and limitation of the number of the Consortium's voting rights to 50% max, in the event of transfer of a stake to the Consortium, which would give it over 50% of the share capital. Such guidelines for shaping relations between PZU S.A. shareholders were set out in an application sent by the State Treasury Minister to the Council of Ministers, which contained a request for the consent to change the PZU S.A. privatization strategy. (*Emphasis added*)

213. The Tribunal does not find surprising in these circumstances that Mr. Jansen, in his witness statement of 12 June 2003, referred to a meeting which he had with Mr. Kaczmarek »in the autumn of 2001« in the following terms:

[...] we finally had a meeting with Mr Kaczmarek, in the autumn of 2001 in which [...] he confirmed some public comments (he also made these to Reuters) that he was not going to execute the agreement

in its present form. Since he was appointed Minister, Mr. Kaczmarek reacted very consistently and very clearly in the meetings, saying. »[...] I will not execute this contract [...] it is not that I doubt that these are legal agreements or that the price is right but I think that given the strategic importance of PZU and the fact that most of the financial sector in Poland is already in foreign hands we cannot give you the control. (Emphasis added)

214. Mr. Jansen was a very credible witness and his evidence in respect of his meeting with Minister Kaczmarek stands uncontradicted.

215. The then Dutch Minister of Economic Affairs, Mrs. Jorritsma-Lebbink, met with Mr. Kaczmarek in Warsaw on 13 February 2002. She remembers »vividly« her conversation when the »Eureko-PZU matter was discussed extensively.« Her account of Minister Kaczmarek's position constitutes clear and compelling evidence of his refusal to honour and respect the unconditional obligation of the RoP under the First Addendum. She stated:

Minister Kaczmarek was very clear: he was neither willing nor able to honour Eureko's contract with the previous government.Kaczmarek argued that the conditions of the contract (sale of 21 percent of PZU shares to Eureko, either through an IPO or privately, which would give Eureko and its Polish partner BIG Bank Gdanski a joint controlling interest in PZU of 51 percent), were unacceptable, even disregarding the privatization legislation (permission from the Ministry of Finance). [...] The policy of Kaczmarek's government, the will of the parliament, the privatization legislation and the unfortunate experiences with PZU thus far (with board members not appointed by the Polish government) ruled out implementation of the agreement. [...] He proposed returning to the original contract, under which Eureko would not pursue a controlling interest. [...] Considering the wishes of the parliament, granting Eureko a 50 percent interest in PZU (together with BIG Bank Gdanski) might be possible.

I said that Eureko obviously expected a signed contract to be honoured. [...] But Minister Kaczmarek refused to budge.« (Emphasis added)

216. The Tribunal notes that, in the midst of that crucial time period when Mr. Kaczmarek was overtly acting as the agent of change of the Government's official investment strategy on the basis of which Eureko had made its initial investment in PZU, he was reminded on 10 December 2001 by ABN AMRO, the Ministry's privatization advisors, that the First Addendum was binding on the State Treasury Ministry and that he did not have the right to rescind that contract even after 31 December 2001: The advisors wrote:

It has been brought to our attention that the Ministry is considering the public offering of a 5% to 10% block of shares in Powszechny Zaklad Ubezpieczefl S.A. (»PZU«) in 2002. In connection with the above, we would like to draw your attention to the fact that the Side Agreement to the Agreement for the Sale of Shares in Powszechny Zaklad Ubezpieczen S.A. entered into on April 3, 2001, by and between the State Treasury Minister and Eureko B.V., BIG Bank Gdanski SA and BIG BG Inwestycje SA (the »Agreement'), the State Treasury Minister agreed to sell 21 % of PZU shares to Eureko B V pursuant to the public share offering procedure. According to Clause 2 Art. 5, the above obligation will continue to apply even if there is no public offering of PZU shares by the end of 2001. In such an event, the shares should be offered to Eureko B.V. within a public offering at a subsequent date, as agreed by the parties in a time schedule. The above obligation is unconditionally binding on the parties. [...] Contrary to the Second Side Agreement of October 4, 2001, the Agreement does not provide for the Minister's right to rescind or terminate the Agreement following December 31, 2001.

217. The stage had been set for consideration by the full Council of Ministers of the Application by the State Treasury Minister, Mr. Kaczmarek, to change, in a draconian and fundamental way, the PZU

privatization strategy of the RoP to the prejudice of Eureko's investment.

218. Because the Resolution of 2 April 2002 is central to the determination by the Tribunal of the present dispute, the Tribunal will reproduce it again in its entirety.

Application for the Council of Minister's Consent to Change the Privatization Strategy for Powszechny Zakład Ubezpieczeń SA - discussed by Wiesław Kaczmarek, State Treasury Minister.

Additional clarifications made by: Aleksander Proksa, Secretary of the Council of Ministers, and Zdzisław Montkiewicz, President of Powszechny Zakład Ubezpieczeń S.A.

The Council of Ministers, following discussions:

1) resolved that it was essential for the State Treasury to maintain control over Powszechny Zakład Ubezpieczeń S.A and accepted the exercise by the State Treasury Minister of the right to withdraw from the Second Additional Agreement dated October 4, 2001, by and between the State Treasury Minister and Eureko B.V., BIG Bank Gdanski SA and BIG BG Inwestycje SA

2) pursuant to Art. 1a Sec. 2 and pursuant to Art. 33 Sec. 3 of the Act of August 30, 1996, on Commercialization and Privatization of State-Owned Enterprises, consented to a change in the privatization strategy for Powszechny Zakład Ubezpieczeń S.A., owned by the State Treasury, to Eureko B.V., a company organized in accordance with Dutch law, with its registered office in Amsterdam, in a public offering, in accordance with Art. 33 Sec. 1 Clause 1 of said Act, after the shares in Powszechny Zakład Ubezpieczeń S.A have been introduced to public trading.

3) obligated the State Treasurer to advise ambassadors of EU member states of a change in the privatization strategy for Powszechny Zakład Ubezpieczeń S.A. (*Emphasis added*)

219. The Resolution truly speaks for itself. In terms, the Council of Ministers of the Government of Poland, because it deems it essential for the State Treasury to maintain control over PZU, decides to change the privatization strategy for PZU. Notwithstanding the terms of the First Addendum, Eureko will no longer be entitled to acquire from the State Treasury an additional 21% of the PZU shares which would have given it control of the Company.

220. In response to a number of letters from Eureko's CEO, Mr. Arnold Hoevenaars, Minister Kaczmarek wrote a lengthy letter to him on 22 May 2002 on behalf of »the Government of the Republic of Poland.« In that letter which, together with its attached schedule, has been reproduced in full earlier [FN26], the Minister quotes *in extenso* the Resolution of 2 April 2002. Somewhat ambiguously, the Minister then writes that the privatization of PZU has not been stopped and that the SPA and the First Addendum »are still binding.«

221. After the Tribunal began its deliberations, it wrote to the parties and asked them for their assistance in the interpretation of this letter. The Tribunal wrote in 22 November 2004:

The letter of 22 May 2002 from Mr. Wiesław Kaczmarek, State Treasury Minister, to Mr. Arnold Hoevenaars, the CEO of Eureko B.V. (Exh. C-190 Annex 47) appears to be the last substantial written communication between the Parties to the SPA prior to the commencement of this arbitration.

Members of the Tribunal, at this stage of their deliberations, find it difficult to interpret this letter. On the one hand, the Minister speaks of a »*change of privatization strategy*« and »*the need for the State Treasury to retain control over PZU*« and, on the other hand, referring to the SPA and the First Addendum, he states that [they] »*are still binding*« and that »*it is the will and the goal of the State Treasury Ministry to perform agreements and to sell PZU S.A.'s shares in a public offering*«. In this latter connection, the Ministry attaches to his letter »*a draft IPO schedule*«.

Mr. Martins da Costa, when questioned by counsel and the Tribunal on this letter, stated that »[he did] not know how those two things are compatible « (Transcript Day 4, p. 539 at lines 17 and 18).

Without repeating their written and oral submissions to date, the Parties are invited to assist the Tribunal in its interpretation of that important letter in the context, of course, of all the evidence on the record. In particular, the Parties will take into consideration Mr. Hoevenaars's reply to the Minister's letter (Exh. C-190 Annex 48) and the Minister's further letter of 1 August 2002 to Mr. Hoevenaars (Exh. C-142).«

222. Having considered the Parties' additional submissions as well as the totality of the evidence, the Tribunal now has no difficulty in interpreting Mr. Kaczmarek's letter. The letter must be read together with the attached schedule and the proposal for a Third Addendum which is referred to in the penultimate paragraph of the letter.

223. The overriding message of the Minister is that the Council of Ministers has decided not to allow control of PZU to be acquired by Eureko notwithstanding the clear terms of the First Addendum. An IPO would be conducted in accordance with a Schedule which would lead to a closing at the end of 2003. And, more tellingly, under the proposed Third Addendum, control of PZU would continue to be vested in the State Treasury even if Eureko held more than 50% of the shares. The key elements of Minister Kaczmarek's Third Addendum are:

- The consortium to remain the industrial investor [...], but not the strategic investor.
- [...] if it holds more than 50% of the shares in PZU S.A. will have the right to exercise a maximum of 50% of the votes at the Shareholders' Meeting. The State Treasury intends to retain a material stake allowing it to retain certain control over the PZU Group.

- Key decisions [...] should be made by the Shareholders' Meeting with the relevant majority (e.g. 90%).

- The right to the State Treasury's representatives to veto some types of decisions.

- PZU S.A. should obtain the right to acquire a stake in the investor.

- PZU S.A. Management Board, and a State Treasury representative in particular, should co-participate in managing the Eureko B.V. Alliance. ^[FN27]

224. In the opinion of the Tribunal, the letter of Minister Kaczmarek, the attached Schedule and the proposed Third Addendum, when read together, belie the representation of the Minister to Eureko that the SPA and the First Addendum »are still binding«. Quite the contrary, these documents, which emanate from the Government of the Republic of Poland, constitute further evidence that Respondent had, by then, consciously and knowingly, decided to violate the investment of Eureko in PZU by refusing to honour its legal commitments.

225. The Tribunal notes that the Respondent's position had not changed in the autumn of 2002. In October of that year, the Vice Minister of the State Treasury, Mr. Sitarski, reiterated to Mr. Jansen in the presence of the Dutch Minister for Foreign Trade the revised privatization strategy of the Polish Government:

In a long monologue, he [Sitarski] repeated all the arguments that had led the Polish Government to take its April 2002 decision that the State Treasury needed to retain control of PZU and that the contract with Eureko therefore needed to be renegotiated.

226. The clear decision by the RoP to refuse to abide by and respect its legal obligations under the SPA and the First Addendum frustrated the investment of Eureko in PZU and its expectations in concluding the SPA. There were rights attached to Eureko's shareholding in PZU and those rights, the

Tribunal finds, were patently violated by the actions and omissions of the Council of Ministers and the Minister of the State Treasury after the execution of the First Addendum. As the Tribunal ruled earlier, these actions and omissions are attributable to the Respondent, the Republic of Poland, and have not been waived by Claimant.

227. The Tribunal does not need to determine whether the distinct acts and omissions of Respondent which Claimant adduced in evidence, such as the several forms of harassment by Polish authorities of Eureko's officers, notably a member of PZU's Supervisory Board, are actionable under the Treaty. The Tribunal has some doubt that, individually or collectively, they rise to that level. However, these acts and omissions have been taken into account by the Tribunal in assessing the whole of the conduct and misconduct of the Respondent which, as the Tribunal has found, are actionable.

228. On 11 February 2003, Eureko^[FN28] requested that its dispute with the Republic of Poland be submitted to an international arbitral tribunal pursuant to Article 8(2) of the Dutch-Polish BIT.

229. It is common ground between the Parties that at that date, and indeed, to the present date, no IPO of the remaining shares of PZU has been carried out and that the State Treasury of the Republic of Poland remains owner of 55% of the Shares.^[FN29]

230. The Tribunal must now determine whether these acts and omissions of the RoP which it has identified in this section of its Award constitute breaches of the Treaty. The Tribunal will now turn to this question.

(ii) Breach of the Treaty?

(1) Art. 3.1 - Fair and Equitable Treatment

231. It is abundantly clear to the Tribunal that Eureko has been treated unfairly and inequitably by the Republic of Poland.

232. Eureko's investments, its contractual rights to an IPO, which would have led it to acquire majority

control of PZU, have been, in the opinion of the Tribunal, unfairly and inequitably treated by the Council of Ministers and Minister of the State Treasury. Those organs of the RoP, consciously and overtly, breached the basic expectations of Eureko that are at the basis of its investment in PZU and were enshrined in the SPA, and, particularly, the First Addendum.

233. The Tribunal has found that the RoP, by the conduct of organs of the State, acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.

234. The Tribunal has no hesitation in concluding that the »fair and equitable« provisions of the Treaty have clearly been violated by the Respondent. In the opinion of the Tribunal, in the present case, the conduct of the RoP could even be characterized as »outrageous« and »shocking«, even though, to constitute breach of treaty, actions and inactions need not be of that degree of extremity.

235. The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that:

»[...]this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment^[FN30] [...]«.

(2) Art. 3.2 - Full Security and Protection

236. The Tribunal is not convinced that the harassment by Polish authorities of senior representatives of Eureko's management^[FN31] breached the standard of full security and protection of the Treaty. Certain of the acts of harassment described by Mr. de Costa in his testimony are disturbing and appear to come close to the line of Treaty breach.

237. However, in any event, there is no clear evidence before the Tribunal that the RoP was the author or instigator of the actions in question. If such actions were to be repeated and sustained, it may be that the responsibility of the Government of Poland would be incurred by a failure to prevent them.

(3) Art. 5 - Measures depriving Eureko of its Investments

238. The Statement of Claim does not allege expropriation as such. It does however maintain that various acts and omissions of Respondent »constitute measures depriving Eureko of its investments«. The question arises whether Poland has taken measures depriving Eureko of investments, directly or indirectly, under Article. 5 of the Treaty.

239. It is plain that Respondent has not deprived Eureko of its shares in PZU which it continues to hold and on which it receives dividends.

240. The Tribunal has found in an earlier section of the present Award that Eureko, under the terms of the First Addendum, acquired rights in respect of the holding of the IPO and that these rights are »assets«. Since the RoP deprived Claimant of those assets by conduct which the Tribunal has found to be inadmissible, it must follow that Eureko has a claim against the RoP under Article 5 of the Treaty.

241. There is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty.^[FN32] The deprivation of contractual rights may be expropriatory in substance and in effect.

242. Furthermore, the measures taken by the RoP in refusing to conduct the IPO are clearly discriminatory. As the Tribunal noted earlier, these measures have been proclaimed by successive Ministers of the State Treasury as being pursued in order to keep PZU under majority Polish control and to exclude

foreign control such as that of Eureko. That discriminatory conduct by the Polish Government is blunt violation of the expectations of the Parties in concluding the SPA and the First Addendum.

243. For the above stated reasons, the Tribunal finds that the RoP has breached Article 5 of the Treaty.

(4) Art. 3.5 - The Umbrella Clause

244. Article 3.5 of the Treaty provides that each Contracting Party »shall observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party«. (A clause of such substance is often called »the umbrella clause«. Thus, insofar as the Government of Poland has entered into obligations vis-à-vis Eureko with regard to the latter's investments, and insofar as the Tribunal has found that the Respondent has acted in breach of those obligations, it stands, *prima facie*, in violation of Article 3.5 of the Treaty.

245. The Tribunal has found that Respondent bound itself, by the combined effect of the terms of the SPA and its First Addendum, to conduct an IPO that would afford Eureko the facility of gaining control of PZU, and that it deliberately violated that obligation. It has found that that obligation pertains to an investment of Eureko. The question accordingly arises, quite apart from the Government of Poland being in breach of Articles 3.1 and 5 of the Treaty on the grounds stated above, is it in further breach of Article 3.5? In the view of the Tribunal, the answer to that question must be in the affirmative, for the reasons that follow.

246. The plain meaning - the »ordinary meaning« -- of a provision prescribing that a State »shall observe any obligations it may have entered into« with regard to certain foreign investments is not obscure. The phrase, »shall observe« is imperative and categorical. »Any« obligations is capacious; it means not only obligations of a certain type, but »any« - that is to say, all - obligations entered into with regard to investments of investors of the other

Contracting Party.

247. This Tribunal is interpreting and applying a Treaty, a bilateral investment treaty, one of more than two thousand such treaties. In so doing, as stated earlier in this Award, it applies public international law. The authoritative codification of the law of treaties is the Vienna Convention on the Law of Treaties, a treaty in force among the very great majority of the States of the world community. Article 31, paragraph 1, of that Convention provides that: »A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.«

248. The ordinary meaning of Article 3.5 has been set out in paragraph 244 above. The context of Article 3.5 is a Treaty whose object and purpose is »the encouragement and reciprocal protection of investment«, a treaty which contains specific provisions designed to accomplish that end, of which Article 3.5 is one. It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.

249. It follows that the effect of Article 3.5 in this proceeding cannot be overlooked, or equated with the Treaty's provisions for fair and equitable treatment, national treatment, most-favored-nation treatment, deprivation of investments, and full protection and security. On the contrary, Article 3.5 must be interpreted to mean something in itself.

250. The immediate, operative effects of Article 3.5 are two. The first is that Eureko's contractual arrangements with the Government of Poland are subject to the jurisdiction of the Tribunal, a conclusion that reinforces the jurisdictional conclusions

earlier reached in this Award. The second is that breaches by Poland of its obligations under the SPA and its First Addendum, as read together, that are not breaches of Articles 3.1 and 5 of the Treaty nevertheless may be breaches of Article 3.5 of the Treaty, since they transgress Poland's Treaty commitment to »observe any obligations it may have entered into« with regard to Eureko's investments.

251. The provenance of »umbrella clauses« has been traced to proposals of Elihu Lauterpacht in connection with legal advice he gave in 1954 in respect of the Iranian Consortium Agreement, described in detail in an article in *Arbitration International* by Anthony C. Sinclair.^[FN33] It found expression in Article II of a draft Convention on Investments Abroad (»the Abs-Shawcross Draft«) of 1959, which provided: »Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.«^[FN34] It was officially espoused in Article 2 of the OECD draft Convention on the Protection of Foreign Property of 1967, in whose preparation, Lauterpacht, as a representative of the United Kingdom, played a part. It provided that: »Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.«^[FN35] The commentary to the draft Convention stated that, »Article 2 represents an application of the general principle of *pacta sunt servanda* - the maintenance of the pledged word« which »also applies to agreements between States and foreign nationals.«^[FN36] Commenting on this article in his Hague Academy lectures in 1969, Professor Prosper Weil concluded that: »The intervention of the umbrella treaty transforms contractual obligations into international obligations...« (»*Problèmes relatifs aux contrats passés entre un État et un particulier.*)«.^[FN37] The late Dr. F. A. Mann described the umbrella clause as »a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independ-

ently of the question whether or no such interference amounts to expropriation...«. [FN38] The leading work on bilateral investment treaties states that: »These provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts...«. [FN39] The United Nations Centre on Transnational Corporations, in a 1988 study on BITs, found that an umbrella clause »makes the respect of such contracts [between the host State and the investor]...an obligation under the treaty«. [FN40] These and other relevant sources are authoritatively surveyed in Christoph Schreuer, »Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road,« [FN41] as well in as Stanimir A. Alexandrov, »Breaches of Contract and Breaches of Treaty«. [FN42]

252. There have been only a few cases that treat the umbrella clause. The earliest appears to be *Fedax v. The Republic of Venezuela*. [FN43] The Respondent had failed to honor promissory notes issued by the Government of Venezuela. The bilateral investment treaty - the Agreement -- between the Netherlands and Venezuela provided in Article 3 that: »Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party.« The Tribunal found that the non-payment of the contractual obligation to pay amounted to a violation of the BIT. The Tribunal held: »...the Republic of Venezuela is under the obligation to honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued, and the Tribunal so finds...«

253. In *SGS Société Générale de Surveillance S.A. vs. Islamic Republic of Pakistan*, [FN44] the Tribunal passed upon the meaning of an umbrella

clause that provided, in Article 11 of the BIT: »Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of investors of the other Contracting Party.« The Claimant maintained that that clause »had the effect of elevating a simple breach of contract claim to a treaty claim under international law«. (Para. 98.) The Tribunal held to the contrary, principally on the following grounds: (a) the text of Article 11 is not limited to contractual commitments. If the Claimant's position were to be accepted, the meaning of Article 11 »appears susceptible of almost indefinite expansion« (Para. 166). (b) The legal consequences that the Claimant attributes to Article 11 »are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party,« that clear and convincing evidence must be adduced by the Claimant that such was the shared intent of the Contracting Parties to the BIT (Para. 167). No such evidence had been introduced. (c) Acceptance of the Claimant's reading would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments (Para. 168). (d) It would also tend to make the substantive protections of the BIT »substantially superfluous« (*ibid.*). There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract would suffice to constitute a treaty violation. (e) Such acceptance would also enable an investor at will to nullify any freely negotiated dispute settlement clause in a State contract (*ibid.*)(f) Article 11 was located not among the substantive obligations of the BIT (»fair and equitable treatment« etc.) but at the end of the Treaty, before its final provisions. (g) In respect of the expansive interpretation of the Claimant of the obligations of the State, the approach rather should prudentially be *in dubio mitius* (Para. 171). The Tribunal acknowledged that Switzerland and Pakistan could have agreed that breaches of each State's contracts with investors of the other State shall be treated as breaches of the BIT, but it con-

cluded that evidence of such agreement - which Pakistan denied - had not been submitted (Para. 173).

254. In a letter to ICSID of October 1, 2003, the Swiss Government stated that it was »alarmed about the very narrow interpretation given to the meaning of [the umbrella clause] by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions«.^[FN45]

255. In *SGS Société Générale de Surveillance S.A. vs. Republic of the Philippines*^[FN46] a subsequent Tribunal took a decidedly different approach. It interpreted a BIT provision, Article X(2), reading: »Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.« It observed that that provision »uses the mandatory term 'shall' in the same way as substantive« articles of the treaty. It held that the term »any obligation« is capable of applying to obligations arising under national law, e.g., those arising from a contract. »Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation that it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.« It added that that article was adopted within the framework of the BIT, »and has to be construed as intended to be effective within that framework.« It continued: »The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments....It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.« It added, »...if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with

the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2)«.^(Paras. 115-118.)

256. This Tribunal's conclusion that »Article X(2) means what it says«, the Tribunal acknowledged, »is however contradicted by the decision of the Tribunal in *SGS v. Pakistan*«. The Tribunal proceeded to consider, and trenchantly criticize, the essential reasoning of that latter Award. It held that this umbrella clause was not susceptible of almost indefinite expansion, because to be applicable the State must have assumed a legal obligation vis-à-vis the specific investment. »This is very far from elevating to the international level all the municipal legislative or administrative or other unilateral measures of a Contracting Party.« It further held that the question is not determined by a presumption against a broad interpretation of an umbrella clause. An umbrella clause need not be interpreted to override dispute settlement clauses of particular contracts. The Tribunal gave some weight to the location of the umbrella clause apart from the substantive articles of the BIT but that was not decisive. »Not only are the reasons given by the Tribunal in *SGS v. Pakistan* unconvincing: the Tribunal failed to give any clear meaning to the 'umbrella clause'«. It went on to hold that the Tribunal in *SGS v. Pakistan* found that a broad interpretation of the umbrella clause would convert investment contracts into treaties, but that that is not what the clause says. »It does not convert questions of contract law into questions of treaty law.« It »addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.« »...Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law.«^(Paras. 121-128.)

257. This Tribunal finds the foregoing analysis of

the Tribunal in *SGS v. the Republic of the Philippines*, a Tribunal which had among its distinguished members Professor Crawford, cogent and convincing. While having the greatest respect for the distinguished members of the Tribunal in *SGS v. the Islamic Republic of Pakistan*, it is constrained to say that it finds its analysis of the umbrella clause less convincing.

258. The Tribunal adds to the considerations advanced in the *Philippines* Award its conclusion that to give effect to the plain meaning of an umbrella clause by no means renders the other substantive protections of a BIT superfluous. As Professor Schreuer points out in his cited article, »The BIT's substantive provisions deal with non-discrimination, fair and equitable treatment, national treatment, MFN treatment, free transfer of payments and protection from expropriation. These issues are not normally covered in contracts.« (At p. 253.) This Tribunal feels bound to add that reliance by the Tribunal in *SGS v. Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties.

259. Moreover, insofar as the placement of the umbrella clause in the BIT - among the substantive obligations or with the final clauses - is of any significance (in this Tribunal's view, little), it should be noted that Article 3.5 of the BIT between the Netherlands and Poland places its umbrella clause amidst the rendering of the Parties' substantive obligations.

260. In view of the foregoing analysis, the Tribunal concludes that the actions and inactions of the Government of Poland that are in breach of Poland's obligations under the Treaty - those that have been held to be unfair and inequitable and expropriatory in effect - also are in breach of its commitment under Article 3.5 of the Treaty to »observe any oblig-

ations it may have entered into with regards to investments of investors« of the Netherlands.

II. COSTS

261. Claimant has prevailed. Consequently, its costs and those of the Tribunal shall be borne by the Respondent. Upon submission to the Tribunal by each party of its costs, the Tribunal will issue an appropriate Order.

III. THE TRIBUNAL'S AWARD

262. Professor Jerzy Rajski dissents from the Tribunal's Partial Award and has appended his dissenting opinion.

FOR THE ABOVE STATED REASONS

The Tribunal decides:

That the Government of Poland is in breach vis-à-vis Eureko B.V. of its obligations under Articles 3.1, 3.5 and 5 of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment

That a second phase of the proceedings on remedies for these breaches shall be the subject of a subsequent Order, to be made in consultation with the parties.

Brussels, 19 August 2005.

Judge Stephen M. Schwebel

Co-arbitrator

Professor Jerzy Rajski

Co-arbitrator (Dissenting)

L. Yves Fortier, C.C., Q.C.

Chairman

IV. DISSENTING OPINION

DISSENTING OPINION

IN THE MATTER OF AN AD HOC ARBITRA-

TION UNDER

**THE AGREEMENT BETWEEN THE KING-
DOM OF THE NETHERLANDS**

**AND THE REPUBLIC OF POLAND ON EN-
COURAGEMENT AND**

**RECIPROCAL PROTECTION OF INVEST-
MENTS**

BETWEEN

EUREKO B.V.

Claimant

and

THE REPUBLIC OF POLAND

Respondent

1. The essence of this dispute is **Eureko B.V.**'s («**Eureko**») claim to acquire 21% of shares in a Polish insurance company, Powszechny Zaklad Ubezpiecze[nacute] S.A. («PZU»), from one of its co-shareholders in PZU - the State Treasury of the Republic of **Poland** (the «State Treasury»). The dispute arose out of a contract concluded by these two parties and, in consequence thereof, is of a purely commercial and contractual nature.

2. On 5 November 1999, the State Treasury concluded with **Eureko** and BIG Bank Gda[nacute] ski S.A. («BIG Bank Gda[nacute] ski») a Share Purchase Agreement relating to PZU (the «SPA»).

Under the terms of this contract, **Eureko** bought 20% and BIG Bank Gda[nacute] ski 10% of PZU shares from the State Treasury. BIG Bank Gda[nacute] ski immediately transferred its shares to BIG BG Inwestycje S.A. («BIG BG Inwestycje»). BIG BG Inwestycje was not a party to the SPA.

The contract indicated the intention of the Seller to publicly trade, through an initial public offering

(IPO), a part or all of the PZU shares as soon as it is practicable, however, no later than by the end of the year 2001, unless it would be impossible to carry the IPO in the above specified period due to market conditions unsatisfactory to the Seller [Article 3 para. 1 of the SPA].

Various disagreements and disputes that arose out of the contractual relations between the parties to the SPA lead to the conclusion on April 3, 2001 of an Addendum to the SPA (the «Addendum»). The Addendum was concluded between the State Treasury, on the one side, and **Eureko**, BIG Bank Gda[nacute] ski and a third subject - BIG BG Inwestycje, on the other side.

Thus the contractual structure of the deal became more complex involving on the side of the State Treasury's partners three corporations, one of which (**Eureko**) was a foreign company.

3. One of the intended aims of the parties to the Addendum was to cause the termination (without the right of repeated lodging of claims) of all outstanding controversies, disputes and court actions that had grown among them in relation to the SPA.

To this effect, they agreed that the fundamental premise and the condition precedent of the Addendum was the Parties' wish to settle and terminate (without the right of repeated lodging of claims) any and all claims and controversies that have arisen among them and in connection with certain individuals in relation to the SPA [Article 1.1 of the Addendum].

The Parties undertook to cease and terminate without delay all pending legal actions, public statements and adverse media activities both in Poland and at an international level [Article 1.2 of the Addendum].

They also agreed that till April 6, 2001, they shall undertake, or cause to be undertaken, actions necessary for the effective withdrawal (including the waiver of all claims pursued without the right of re-

peated lodging thereof) of all summons and claims with regard to the SPA, as well as, all other summons and claims that had been filed in connection with the resolutions of the general shareholders' meeting of PZU lodged by the Seller, the Buyers or by one or more persons (identified by name) representing either Eureko or BIG Bank Gda[nacute] ski or BIG BG Inwestycje.

It is worth of note that all actions indicated in these contractual provisions were pending before competent Polish courts of law.

It is not disputed that both Parties (i.e., the State Treasury on one side and Eureko, BIG Bank Gda[nacute] ski and BIG BG Inwestycje on the other side) performed their obligations under Article 1 of the Addendum to effectuate a full and final waiver and release of all lawsuits and claims that had arisen among them and in connection with certain individuals representing i.a. governing bodies of Eureko, BIG Bank Gda[nacute] ski and BIG BG Inwestycje pending before competent Polish courts.

4. The Parties agreed that they and their duly elected representatives in the respective management boards and supervisory boards of PZU and its subsidiaries shall exercise due care and diligence in order to have the IPO concluded before December 31, 2001 [Article 5.1 of the Addendum].

It results clearly from this provision that the State Treasury undertook a duty of due care and diligence in order to have the IPO concluded before December 31, 2001. Such obligation did not bind it to achieve the envisaged result, i.e., to have the IPO conducted before December 31, 2001.

This is why the Parties expressly agreed that in case the IPO is not completed by the end of 2001, they unconditionally undertake to adopt a new schedule for the IPO [Article 5.3 of the Addendum].

However, although the Parties unconditionally undertook to adopt a new schedule for the IPO, they did not specify the time limit for the performance.

This solution might be justified by various reasons, e.g., taking into consideration changes of circumstances which might fundamentally alter the equilibrium of the contract.

By agreeing the above clause the Parties intended to protect their legitimate interests.

Eureko has thus had a claim against the State Treasury to specify the time limit for the adoption of a new schedule for the IPO. In case the Parties did not come to an agreement in this respect, the dispute should be resolved by the competent courts as agreed in the contract.

5. However the Tribunal is not satisfied with the clear content of the above contractual provisions, as they are inconsistent with the responsibility of the Republic of Poland vis-à-vis Eureko that has been assumed by the Tribunal.

To resolve the perceived inconsistency, the Tribunal resorts to an interpretation bordering on manipulation, incompatible with basic rules applicable under Polish law, which is the law governing the SPA and the Addendum.

It is to be noted that in the long reasons to its decision, the Tribunal has not once referred to any relevant provisions of Polish civil law when interpreting the contracts concluded by the Parties. This approach makes the impression that the Tribunal treats them as contracts »*sans loi*« -- which facilitates their free interpretation.

In Polish contract law and practice (as in the law and practice of many other countries) it is beyond any doubt that the parties to a contract do not create contractual rules in its preamble (unless otherwise expressly stipulated by the parties). The preamble to a contract simply serves other purposes (to declare the parties intentions and expectations, to describe their objectives, etc.).

The Tribunal has breached this fundamental rule by assuming that » *the preamble... of the First Addendum demonstrates clearly that the statement of*

intent [in respect of the IPO - J.R.] which had been agreed by the Parties in the SPA crystallized and became a firm commitment of the State Treasury» [para. 152].

The Tribunal tries to justify this statement by referring to excerpts from paragraphs 2, 3 and 4 of the Preamble. However, the Tribunal forgets to indicate that all of them have been formulated under Part D of the Preamble which clearly indicates that they only express the intention of the Parties (*»By concluding this Addendum the Parties intend«*).

Thus the Tribunal has transformed a clear statement of intent into a firm commitment of the State Treasury.

Then, the Tribunal quotes some excerpts from Article 5 of the Addendum -- dissociated from the whole contractual context of this provision [para. 156].

The Tribunal confirms that by the terms of Article 5.1 of the First Addendum, the State Treasury binds itself *»to exercise due care and diligence in order to have the IPO concluded before December 31, 2001«*, but does not indicate that this obligation does not bind the State Treasury to actually have the IPO concluded before December 31, 2001.

The Tribunal carefully omits to observe that although the Parties had unconditionally undertaken to adopt a new schedule for the IPO they had not agreed the time limits for the performance of this obligation.

To make its assumption more credible, the Tribunal refers *»to another unconditional undertaking of the State Treasury set out in Article 5.4«*, but omits to quote the text of this provision - which reveals that the obligation concerns a post-IPO undertaking of the State Treasury (*»5.4 The Parties unconditionally undertake that following the IPO the Parties shall make their utmost efforts to agree the schedule for public offering of any remaining shares held by the State Treasury«*).

Finally the Tribunal stresses that the second Article 5.4 of the Addendum *»contains still a further undertaking of the State Treasury: to assist Eureko to obtain the permits of the Ministry of Finance to allow Eureko to become the majority, 51% owner of PZU«*.

Here again the Tribunal restrains itself from indicating the obvious - that this is not an undertaking of the State Treasury to conclude the IPO.

On the basis of misinterpretation of the above excerpts from the contractual provisions *» the Tribunal finds that under the First Addendum, the Republic of Poland [sic! - J.R.] contracted obligations and Eureko acquired rights from its shareholding in PZU which were entitled to protection under the Treaty«* [para. 157].

6. In these circumstances it is not surprising that Eureko decided, at all hazards, to avoid going to the competent court of commercial jurisdiction to determine its contractual rights.

To that effect it adopted tactics to politicize on an international level its commercial dispute with the State Treasury as a PZU shareholder, in order to be able to mask it as a BIT dispute with the Republic of **Poland**.

This has created a situation where now a BIT Tribunal has to interpret a contract governed by Polish law concluded by **Eureko**, BIG Bank Gda[acute] ski and BIG BG Inwestycje with the State Treasury and to examine their contractual relations in the absence of both **Eureko's** partners and of the other contractual party (the State Treasury) who cannot be represented in BIT arbitration proceedings against the Republic of **Poland**.

To cover this, **Eureko** introduced significant confusion during the arbitration proceedings using interchangeably the concepts and terms *»the State Treasury«* and *»the Republic of **Poland**«*, in order to create an impression that the Republic of **Poland** was its partner in the process of negotiations and

performance of the SPA and the Addendum.

This confusion is still visible throughout the Tribunal's reasons and probably contributed to a certain extent to its decision.

Indeed, the Tribunal repeatedly expressly identifies the Republic of Poland as Eureko's contractual partner in the SPA and the Addendum. Examples of this approach are to be found in the following statements:

* » *The Tribunal finds that under the First Addendum the Republic of Poland contracted obligations*« [para. 157].

* » *The Tribunal finds confirmation in the Second Addendum of its present conclusion that the First Addendum conferred on Eureko acquired rights in respect of the conduct of the IPO and the obligations of the Republic of Poland in that respect*« [para. 158].

* » *The Tribunal has found that under clear terms of the First Addendum the statement of intent of the Republic of Poland in the SPA to carry out IPO of PZU became a firm and binding commitment of the State Treasury*« [para. 201].

* At para. 512 the Tribunal refers to »*the unconditional obligation of the Republic of Poland under the First Addendum*«.

* » *The clear decision by the Republic of Poland to refuse abide by and respect its legal obligations under the SPA and the First Addendum*« [para. 225].

7. The above analysis of the provisions of the Addendum that are crucial for this case reveals that the only investment which Eureko made in PZU was constituted by the assets in the form of the PZU shares acquired from the State Treasury (20% of the shareholding in PZU) and from BIG BG Inwestycje (10% of the shareholding in PZU), the latter being a non-party to the SPA.

Non-enforceable rights and expectations arising out

of the SPA and the Addendum, however, are not an investment - even in the widest sense of the term - both in Polish and international law. While they may be connected with the investment made by Eureko in PZU, they are not part of it.

A different view adopted by the Tribunal in this respect is groundless.

This probably explains why the Tribunal had to discover a new concept of »investment«, in order to be able to find a ground entitling Eureko to protection under the BIT.

This completely novel (both in Polish and international law) concept of investment has been described by the Tribunal as »*the ability to exercise substantial influence on the management and operation*« of a commercial company.

On the basis of very limited evidence, without the participation of the other contractual party (i.e., the State Treasury) in the arbitral proceedings, after only a very superficial analysis of some isolated contractual provisions (dissociated from their contractual context), the Tribunal has found that corporate rights granted to Eureko described as the ability to exercise substantial influence over management and operation of PZU were not contingent [para. 142].

However, the Tribunal's view according to which »*they were real rights granted in clear terms to Eureko by its contractual partner*« is badly lacking any precise legal grounds.

Indeed, the Tribunal has not indicated any contractual provisions in which these »clear terms« may be found.

It has also based its decisions »on the totality of evidence« without any precise indication, limiting itself to stress the particular importance of the testimony of Mr. Jansen.

Of course, the representative of the State Treasury - Eureko's contractual partner - could not participate

in these proceedings and, in consequence thereof, could not give any testimony in that respect.

On the basis of a very limited evidence and without profound analysis of the whole contractual complex composed of SPA and the Addendum, as well as of the contractual and corporate relations between the contractual parties (which is an analysis that every competent court of commercial jurisdiction would have had to conduct), the Tribunal has come to a firm and far reaching conclusion that the ability (as such?) »to exercise substantial influence over management and operation of PZU« qualifies as an investment under the BIT and entitles Eureko to protection under the Treaty.

Not only has the Tribunal been unable to define this extremely vague concept, but it has failed to even clarify it - for instance, by explaining at least the meaning of the notion of »substantial influence« over the management and operation of PZU.

A right the content of which cannot be determined with sufficient certainty may not be recognized as non contingent. To recognize it as an »investment« under the Treaty is, therefore, completely groundless.

The above analysis proves that there is no legal basis for Eureko's claim under the BIT, as that the fundamental premise for the responsibility of the Republic of Poland is lacking.

8. In the reasons of the Award, the Tribunal stresses that, in its deliberations, it has »examined the question of the attribution to the Polish Government of the acts of the State Treasury Minister in particular depth, with the benefit of the exceptional knowledge and insight of its distinguished member who is steeped in Polish law« [para. 121].

Although this question, for the reasons discussed in the preceding paragraphs, is of no importance to the case at hand, it is to be noted that the reasons of the Tribunal's decision indicate that the Tribunal has some difficulties in understanding that the SPA and

the Addendum were concluded by two equal parties enjoying the same legal status of civil law juridical persons legally separated from their owners.

These contractual parties are (1) the State Treasury, as the one side and (2) Eureko, BIG Bank Gda[na] ski and - in respect of the Addendum - BIG BG Inwestycje on the other side. (It is worth of note that the Tribunal has completely disregarded the fact that Eureko was not the sole contracting party of the State Treasury both in the SPA and in the Addendum).

The State Treasury is a specific juridical person which has been created by law (Article 33 of the Polish Civil Code).

Article 34 of the Civil Code expressly provides that in civil law relationships, the State Treasury shall be considered as the subject of the rights and duties which pertain to the State property that does not belong to other State juridical persons.

Article 40 §1 of the Civil Code confirms that the State Treasury is exclusively liable for its obligations.

It clearly results from these provisions that the State Treasury is a juridical person separate from the State.

Nevertheless the Tribunal is of a different opinion following in this respect a view of a late Polish scholar indicated by the Claimant [para. 133].

A Wolter, quoted by the Tribunal with approval, wrote in the 1960s that »in the prevailing view the State Treasury is not a legal entity separated from the State « (this sentence was reproduced in all posthumous editions of his manual).

This view expressed the reality under the communist political and economic system based on socialist ownership of means of production and centralized state management of a socialized economy.

However, it has become obsolete after the transition

of Poland to a democratic political system and a market economy. Poland has profoundly changed its legal system in order to create a proper legal framework for a market economy. Indeed, the State's ownership and property rights have been completely separated from the State and transferred to State juridical persons. The State Treasury and other State juridical persons regained their fully autonomous status and have been legally separated from the organization of the State.

The State Treasury's exclusive function is to exercise all rights and fulfill duties deriving from such ownership and other property rights which do not belong to any other State juridical persons (Article 44¹ of the Polish Civil Code).

It is beyond any doubt that the State Treasury as an autonomous juridical person being a subject of civil- and commercial law relationships is not an organ of the State - even in the widest possible meaning of the word.

It also follows from the very nature of this specific juridical person created by law that it cannot be authorized to exercise any public or regulatory functions.

The different view adopted by the Tribunal in this respect is a misunderstanding.

Thus the Tribunal's conclusion that *»whatever may be the status of the State Treasury in Polish law, in the perspective of international law, the Republic of Poland is responsible to Eureka for the actions of the State Treasury«* [para 134] is groundless.

The Tribunal bases its conclusion on Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. However, the above analysis of the nature of the State Treasury confirms that the State Treasury may not be recognized as an organ of the Polish State, even on the widest possible interpretation of Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

It is to be noted that the above conclusion of the Tribunal is also inconsistent with the »crystal clear« text of the above-mentioned Article 4 and the Tribunal's own statement that *»in the perspective of international law, it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State «* [para. 127].

The Tribunal based its decision on a different view, according to which the conduct of a State-owned juridical person which does not have the status of a State organ in accordance with the internal law of the Republic of Poland should be considered an act of the Polish State.

9. The State Treasury acts in civil and commercial law relations through its statutory representative indicated by law.

Pursuant to Article 2 para. 5 of the Act of 8 August 1996 on the principles of performance of rights belonging to the State Treasury, the Minister of the State Treasury i.a. *»exercises rights resulting from the patrimonial rights pertaining to the State Treasury in the scope of rights derived from the shares belonging to the State Treasury, including rights in personam«*.

Acting in a private law capacity as the statutory representative of the State Treasury, the Minister of State Treasury has the status of a subject of civil law (an agent) fully independent from any public authority.

Indeed, no public authority, including the Government of the Republic of Poland can effectively intervene in the scope of his exclusive rights and competence established by the pertinent Act of Parliament (derived from his status of the statutory representative of the State Treasury).

The Tribunal has based its decision on a wrong view in this respect: *»In view of the Tribunal, there*

can be no doubt that the Minister of the State Treasury in the present case, when he sold to the Eureko Consortium 30% of the State Treasury's shareholding interest in PZU by virtue of the SPA and undertook in the First Addendum to carry out the IPO as to an additional 21% of the shareholding, or under the Second Addendum, sell it outright to Eureko, was acting pursuant to clear authority conferred on him by decision of the Council Ministers of the Government of Poland in conformity with the officially approved privatization policy of that Government. As such, the Minister of the State Treasury engaged the responsibility of the Republic of Poland« [para. 129].

This view is both inaccurate and groundless.

First of all, it is not disputed that the Seller was not the Minister of the State Treasury, but the State Treasury represented by the Minister of the State Treasury as its statutory representative.

Secondly, the State Treasury sold to Eureko only 20% of the shareholding interest in PZU; 10% of this shareholding was sold to BIG Bank Gda[ńsk] which transferred it immediately to Big BG Inwestycje. It is very characteristic that the Tribunal has, in the reasons to the Award, completely ignored the existence of other Parties to the SPA and Addendum, treating the pertinent contracts as concluded only between Eureko and the State Treasury.

Finally, to say that the Minister of State Treasury » *was acting pursuant to a clear authority conferred on him by decision of the Council of Ministers* « (which is the Government of Poland) and that » *as such, the Minister of the State Treasury engaged the responsibility of the Republic of Poland* « mean that the Tribunal misunderstood Polish law.

Polish privatization law (the Act of 30 August 1996 on commercialization and privatization) provides that privatization of these state-owned enterprises and companies owned by the State Treasury which are of particular importance for the national eco-

nomy requires the consent of the Council of Ministers. PZU belonged to this category.

Therefore the consent of the Council of Ministers was a necessary legal condition upon the satisfaction of which the process of PZU privatization could be initiated.

The Council of Ministers granted such consent pursuant to Article 1a Section 2 of the above Act to the privatization of PZU and accepted its privatization strategy.

In spite of the clear language of the Resolution of the Council of Ministers, the Tribunal insists that the PZU privatization strategy was not accepted but adopted by the Council of Ministers (see, e.g., para. 193 -- » *privatization strategy of PZU adopted by the Republic of Poland's Council of Ministers* «; para. 194 -- » *the implementation of its privatization strategy by the Republic of Poland* «; etc.).

The Tribunal's intention seems to be to shift the responsibility for the adoption of the PZU privatization strategy from the State Treasury to the Republic of Poland.

However, the Council of Ministers could not and, in fact, did not grant any authority to the Minister of the State Treasury to conclude the contracts with Eureko.

The authority of the Minister of State Treasury (as a statutory representative of State Treasury) to enter into the SPA and the Addendum with Eureko, BIG Bank Gda[ńsk] and BIG BG Inwestycje was conferred to him by law.

There should be no doubt that acting as a statutory representative of the State Treasury pursuant to a clear authority conferred on him by mandatory provisions of law, the Minister of State Treasury could not engage any responsibility of the Republic of Poland vis-à-vis Eureko (and its Polish partners) either in the SPA or in the Addendum.

As it has been explained above, when the Minister

of State Treasury acts in his private law capacity as a statutory representative of the State Treasury, he is fully independent from any public authorities. His independence in that respect is guaranteed by law.

The Minister of the State Treasury as a statutory representative of the State Treasury has been expressly authorized by law to exercise all rights derived from PZU shares (Article 2 para. 5 of the Act of 8 August 1996 on the principles of performance of rights belonging to the State Treasury).

He is exclusively responsible for the proper exercise of these rights. No public authority including the Government of Poland can relieve him from this responsibility established by law.

Consequently there should be no doubt that the Minister of the State Treasury acting as the statutory representative of the State Treasury cannot engage the responsibility of the Republic of Poland vis-à-vis its contractual parties, irrespective of their nationality. This does not mean that the Government of Poland representing the interests of the Nation cannot express its views concerning privatization of State-owned companies. It may express its views or present its opinions in that respect (as happened in this case).

However, even if these views or opinions are presented in a form of resolution they are of non-binding nature.

The statutory representative of the State Treasury -- an autonomous juridical person, legally separated from the organization of the State -- may take into consideration such views or opinions, but is under a strict legal duty to act exclusively according to rules of law in the best interest of the State Treasury as the owner of PZU shares.

It results from these remarks that the Tribunal's decision assuming that the Minister of State Treasury acting in his private law capacity as a statutory representative of the State Treasury being the PZU

shareholder may engage the Responsibility of the Republic of Poland is groundless.

10. To conclude this dissenting opinion, it is to be stressed that Eureko's only investment in PZU within the meaning of Article 1 of the Treaty has consisted of the assets acquired in the form of PZU shares from the State Treasury and BIG BG Inwestycje.

There is no doubt that this investment has been fully protected in Poland, both according to Polish Law and generally accepted international standards.

Non-enforceable rights arising out of the contracts concluded by Eureko and its Polish partners (BIG Bank Gdańsk and BIG BG Inwestycje) with the State Treasury as a PZU shareholder, as well as some expectations created during the process of negotiations and discussions between these Parties do not qualify as an investment in the sense of Article 1 of the BIT, even if its widest possible interpretation is accepted.

Thus in my opinion there is no ground which could entitle Eureko to protection under the Treaty. It results therefrom that the Government of the Republic of Poland cannot be in breach vis-à-vis Eureko of its obligation under Article 3.1 [3.5] and 5 of the Agreement between the Kingdom of Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment.

11. It is worth of note that by opening a wide door to foreign parties to commercial contracts concluded with a State-owned company to switch their contractual disputes from normal jurisdiction of international commercial arbitration tribunals or state courts to BIT Tribunals, the majority of this Tribunal has created a potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatizations of State-owned companies.

At the same time, this decision may lead to undermine the fundamental principles upon which both

national and international laws on contracts have been based: equal legal protection of all parties to commercial contracts irrespective of their nationality.

The Tribunal's decision may lead to create a privileged class of foreign parties to commercial contract who may easily transform their contractual disputes with State-owned companies into BIT disputes. This way, jurisdiction clauses agreed by the parties submitting all contractual disputes between the parties to an international arbitration tribunal or a state court may be easily frustrated by a foreign contracting party.

It is furthermore to be noted that in this particular case, only one of three commercial companies which entered into contracts with the State Treasury could submit its contractual dispute to this Tribunal.

BIG Bank Gda[ńskie] and BIG BG Inwestycje have not been granted this privilege, although they have been Parties to the same contracts and, in consequence thereof, acquired rights and obligations derived from them.

All of this confirms that the Tribunal's decision is not only inconsistent with the Dutch-Polish BIT, but also with *»universally acknowledged rules and principles of international law«*.

August 19, 2005

Jerzy Rajski

Co-Arbitrator, dissenting

FN1. The »Buyers« are occasionally referred to as the »Eureko Consortium.«

FN2. See report of Poland's Supreme Audit Chamber of September 12, 2003, paragraphs 2.1 and 2.1.1.

FN3. See the reference to »grave formal defects« and to »the defective issue prospectus« in the letter

of the Polish Minister of the State Treasury of 22 May 2002 to Eureko quoted *infra* in Para. 71.

FN4. This word »zniweczony« can also mean »annihilate, frustrate or destroy« - translator's note

FN5. During the hearing, the Tribunal was informed by the Parties that the Polish language version of this article which is the only legally valid and binding version refers, literally, to disputes »having the agreement in its background«.

FN6. *Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3. Decision on Annulment (3 July 2002)

FN7. *Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3. Decision on Jurisdiction and on the Merits (21 November 2000). The text of the Award is published at [40 I.L.M. 426 \(2001\)](#).

FN8. The Tribunal has reviewed and considered the other cases cited by Respondent in support of its jurisdictional objection. These decisions do not lead the Tribunal to any other conclusion than that which it has reached in the present section of its Award.

FN9. The Tribunal feels obliged to note that neither in the written nor in the oral phase of the arbitration, did the Respondent contend that the execution and performance of the SPA and the subsequent Addenda by the Minister of the State Treasury were not attributable to the Republic of Poland. Indeed, when asked by a member of the Tribunal during the hearing in September 2004 whether either party took the position that the Republic of Poland was not engaged by the signature of the Minister of the State Treasury, Professor Crawford, on behalf of Respondent, replied: **»We are not taking [that position] Sir «**. (See Closing arguments, Day 6, at page 683:3.)

FN10. See the Report of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, page 87, Para. 6.

FN11. *Ibid.*, page 83, Para. 7.

FN12. *Ibid.*, Article 5, comment 1

FN13. The evidence does not disclose that the corporate governance rights of the First Addendum, particularly as regards the appointment of the Management Board of PZU (See Article 3), were violated by Respondent. In any event, Claimant expressly stated in its Reply that it has no claim for BIT violation for events that took place between April and December 2001.

FN14. The Tribunal notes in this connection the uncontradicted statement by Claimant in its Statement of Claim that, in order to obtain that influence on PZU's management which was disproportionate to its shareholding, »it was prepared to pay a substantial premium over the net asset value of the PZU shares« (At Para. C.4, page 12).

FN15. The Tribunal will have occasion to revert later in its Award to the effect of the representations which the RoP made to Eureko in the context of the privatization of PZU. (See *infra*, paragraphs 191 et seq.)

FN16. See in particular the evidence of Mr. Talone, Day 2, pp. 278:18 - 279:2.

FN17. The Tribunal was not persuaded by the argument advanced by Claimant's expert witness, Dr. Wisniewski, that there was a possibility of resurrecting these claims. Mr. Wisniewski, Day 5, at p. 586 et seq.

FN18. In support of its argument, Respondent submitted the opinion of a Polish Foreign Ministry official involved in the negotiation of the Treaty. This opinion, however, was rebutted by an opinion to the contrary of a Dutch Foreign Ministry official.

FN19. See, in particular, CME Czech Republic B.V. v. The Czech Republic (Partial Award 13 September 2001) at pp. 154-164 and also the cases referred to in Para. 605 of that Award at p. 170.

FN20. Commentary to Article 1, paragraph 1.

FN21. Commentary to Article 1, paragraph 8.

FN22. Commentary to Article 2, paragraph 4.

FN23. See, for example, the list of no less than 22 acts of the RoP which, Claimant affirms, engage the responsibility of Respondent (Claimant's Post-Hearing Brief at Para. 316).«

FN24. See • Jansen, Day 1, at pp. 101:5-17, 102:12-13. • Deriga, Day 2, at pp. 201:17-21, 202:6-9. • Talone, Day 2, at pp. 253:12-21, 254:5-7, 11-16.

FN25. See Exhibit C.PRESS, sub 22.

FN26. See Para. 71, *supra*.

FN27. Exhibit C-38.

FN28. On its behalf as well as on behalf of BBG in which it has a 20% shareholding.

FN29. Approximately fifteen per cent (15%) of the PZU shares have been distributed to employees of the Company.

FN30. Tecmed v. Mexico 43 I.L.M. 133 (Award of 29 May 2003) at Para. 154.

FN31. See Testimony of Mr. Martins da Costa, Day 4, at pp. 529-532.

FN32. See, in particular, Tecmed v. Mexico *supra* note 35

Metalclad Corporation v. United Mexican States (Award of 30 August 2000) (ICSID Case No. ARB(AF)/97/1)

CME Czech Republic B.V. v. The Czech Republic *supra* note 18.

FN33. »The Origins of the Umbrella Clause in the International Law of Investment Protection«, 20 *Arbitration International* 411, 414-418.

- FN34.** *Ibid.*, p. 421.
- FN35.** *Ibid.*, pp. 427-433
- FN36.** *Ibid.*, p. 123, note 1(a).
- FN37.** *Recueil des Cours* III (1969), p.130.
- FN38.** »British Treaties for the Promotion and Protection of Investments,« *52 British Year Book of International Law* 241, at 246 (1981).
- FN39.** R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), at 81-82.
- FN40.** United Nations Centre on Transnational Corporations, *Bilateral Investment Treaties* 39 (1988).
- FN41.** *5 The Journal of World Investment Law & Trade* 249-255 (2004).
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